

its petition and the denial thereof in defendant's answer. Estoppel is not plead and this evidence is inadmissible.

The suit from which the foregoing portions of the record were taken was not between the parties in the present cause, the plaintiffs in this case not being a party to the said cause No. 24720 in the Fulton Superior Court.

The said evidence is irrelevant and immaterial to any issue in this cause.

Error is assigned upon the allowance of each fragment in evidence with the same force and effect as if made a separate ground of this motion.

22. The court erred in permitting plaintiffs, over defendant's objection then and there interposed, on the grounds below stated, to introduce in evidence the following portions of the record of the suit in Fulton Superior Court, still pending, brought by the State of Georgia against Western Union Telegraph Company, known as No. 27274 in Fulton Superior Court December 12, 1912, to-wit:

Par. 2 of petition:

"2. That during the month of August, 1912 there was served upon his Excellency, Joseph M. Brown, Governor of said State what purports to be a notice by the said Western Union Telegraph Company to [fol. 605] the State of Georgia of the desire of said company to acquire a right of way upon which to maintain and operate a telegraph line on the lands composing the right of way of the Western & Atlantic Railroad, the property of said State, extending from Atlanta, Georgia through the counties of Fulton, Cobb, Bartow, Whitfield and Catoosa to the Tennessee State line, the said company desiring a right of way for its said line "for a perpetual term." The said company in said notice attempts to offer the State of Georgia the sum of \$5.00 per mile for the right of way to be so occupied, and requests in the notice that it be advised on or before the 8th day of August, 1912 if this sum is acceptable, and advises that failure to make response within that time will be treated by the company as a refusal of its offer and that 'it will proceed to have said right of way condemned as by law provided.' A copy of said notice is hereto attached, marked 'Exhibit A' and made a part of this petition."

Par. 2 of answer:

"2. In answer to paragraphs 2 and 3 of said petition, defendant admits that notice was served by it as stated, and substantially as set forth in Exhibits 'A' and 'B' of said petition, except that said exhibits do not show the dates of said notice and acknowledgment. Defendant shows, however, that at the time said notice was served upon the State of Georgia by service of the Governor, the General Assembly of Georgia was in session."

Par. 7 of petition:

"(7) That it appears from said notices served upon the Governor that it is the intention and purpose of said Western Union Telegraph

Company to condemn a portion of the right of way of the State's railroad, lying within the State of Georgia, for its telegraph lines, not only during the term for which said railroad is now under lease but in perpetuity, and for this purpose it is attempting to make the State [fol. 606] a party to the condemnation proceedings heretofore begun against the lessee of said railroad wherein it is sought to condemn the usufructuary interest in the right of way as held by said lessee."

A portion of Par. 6 of answer:

"6. In answer to paragraph 7 of said petition, defendant admits that it is its purpose to condemn a portion of said right of way in perpetuity, subject, however, to the laws of Georgia."

Exhibit "A" to petition and which is referred to in Par. 2 thereof:

#### "EXHIBIT 'A'"

"To the State of Georgia:

"The Western Union Telegraph Company desires to acquire a right of way upon which to maintain and operate, and when necessary construct, maintain and operate its telegraph line on the lands composing the right of way of your railroad, known as the Western & Atlantic Railroad, as hereinafter more fully set forth.

"The location of the right of way sought to be acquired in substantially that location now occupied by the telegraph line of the Western Union Telegraph Company along main line of your railroad from Atlanta, Ga. to the Tennessee line at or near Graysville, Ga.

"Said location is more specifically defined as follows:

#### "Main Line

"The line runs from Atlantic, Ga. to the Tennessee State Line at or near Graysville, Ga. through the counties of Fulton, Cobb, Bartow, Gordon, Whitfield and Catoosa, a distance of approximately 121.37.

"Said telegraph line will enter upon the right of way of said railroad at the Marietta street bridge at the same point where it now enters upon said right of way on the east side of said main line tracks, [fol. 607] and will continue on the east side of said tracks for a distance of forty-five poles to the north end of Howell's yard, a point 1,110 feet north of the 3rd mile post. At this point said line will cross said tracks and continue on the west side of the tracks 110 poles to the north end of Hill's Park, at a point 1,905 feet north of the 5th mile post. At this point said line will cross said tracks and continue on the east side of said tracks 32 poles to the 6th mile post, at which point said line will divide, and part of said line cross to the west side of said railroad tracks. From the 6th mile post to the Tennessee State line said line will extend on both sides of said tracks as now located, except at the following points:

"At Marietta the wires on the east side of the track will cross to the west side at a point 690 feet south of the present passenger depot at Marietta, and run along with wires on the west side for a distance

of 94 poles, as now located, said east wires crossing back to the east side at a point 2,150 feet north of the 22nd mile post.

"At Adairsville, the wires on the east side of the track will cross over to the west side of the track at a point 1,638 feet south of the passenger depot, and extend along with wires on the west side for a distance of 20 poles, as now located, to a point 1,285 feet north of the passenger depot at Adairsville, at which point said wires will cross back to the east of the track.

"At Dalton, Ga., the wires on the east side of the track will cross over to the west side of the track at a point 742 feet south of 99th mile post, and extend along the west side to a point 225 feet south of the passenger depot, where they will cross to the east side, and extend along the east side to a point 600 feet north of passenger depot, where they will cross to the west side and extend along the west side to a point 1,000 feet from passenger depot, where they will return to the east side.

[fol. 608] "Over the tunnel near Tunnel Hill, said wires will consolidate, extending over the tunnel, as now located.

"The right of way thus sought to be acquired by the Western Union Telegraph Company shall be of sufficient width to enable it to conveniently construct (when necessary) maintain and operate its line located and constructed substantially as follows:

"As many wires or cables of wire as may be necessary from time to time to transact the business of said company. These wires or cables are to be strung on poles placed at an average distance from the center of said present main line track of twenty-seven (27) feet, except where said right of way is limited or widened, with a minimum distance from edge of right of way (except where right of way is limited or widened) of six feet. The poles shall have a length of not less than twenty (20) feet, and shall be placed in the ground a depth of not less than four (4) feet, and have a circumference of about thirty (30) inches at the base and twenty (20) inches at the top. At highways, railway crossings, depots and side tracks, said poles shall have a height of from twenty-five (25) to forty (40) feet above the ground. There will be an average of forty (40) poles per mile on said telegraph line on both sides of said tracks from Atlanta, Ga., to Kingston, Ga., and of thirty (30) poles per mile from Kingston, Ga., to the Tennessee line.

"In order to reach the offices of the Western Union Telegraph Company as now located or to be established by it, there will be wires crossing the tracks of said railroad from the main telegraph line, with one or more poles on the right of way of said railroad, at the following points: Bolton, Marietta, Emerson, Kingston, Vinings, Kennesaw, Cartersville, Adairsville, Smyrna, Acworth, Rodgers, Calhoun, Resaca, Dalton, Tunnel Hill, Ringgold and Graysville.

"At all points where said telegraph wires will cross said tracks for [fol. 609] reaching offices, the lowest wire will not be less than twenty-five (25) feet above the tracks.

"The Western Union Company desires the above described right of way for the purposes herein specified for a perpetual term, subject to the re-location of said telegraph line on said right of way, to conform

to any uses and needs of said railroad company for railroad purposes.

"In the event that you intend at this time to construct a telegraph line for railroad purposes on your said right of way, and that you select the location herein designated and selected for the telegraph line of the Western Union Telegraph Company, the Western Union Telegraph Company agrees to shift the desired right of way and to erect its fixtures, posts and wires, and to construct, maintain and operate its telegraph line on the line herein referred to, upon such portion of said right of way and at such distance from the track of said railroad and its telegraph line for railroad uses, as will not obstruct or interfere with the ordinary use of such railroad telegraph line or right of way for railroad uses.

"For this right of way, the Western Union Telegraph Company offers you the sum of Five (\$5.00) Dollars per mile per post of right of way so occupied.

"Please advise on or before August 8th, 1912, if this sum is acceptable, so that the matter may be closed. Failure to make response within the time will be treated by the Western Union Telegraph Company as a refusal of its offer, and it will proceed to have said right of way condemned as by law provided.

"Dorsey, Brewster, Howell & Heyman, Duly Authorized Attorneys for the Western Union Telegraph Company."

[fols. 610-623] Defendant's counsel then and there objected to the introduction of said portions of the record in said case No. 27274 and separately to each portion so offered, upon the following grounds:

That a fragment or portion of petition and answer can not be introduced in evidence; the entire document must be introduced as evidence, or none of it can be put in; said evidence, and each of the several portions thereof, did not prove title in the plaintiff; and besides were inadmissible as an estoppel or admission, or as evidence against the defendant for the additional reason that the same had not been plead by the plaintiffs.

The suit from which the foregoing portions of the record were taken was not between the parties in the present cause, the plaintiffs in this case not being a party to the said cause No. 27274 in the Fulton Superior Court.

The said evidence is irrelevant and immaterial to any issue in this cause.

Error is assigned upon the allowance of each fragment in evidence with the same force and effect as if made a separate ground of this motion.

23. The court erred in permitting plaintiffs to introduce in evidence the contract of June 8th 1884 between the Louisville & Nashville Railroad and the Nashville, Chattanooga & St. Louis Railway and the Western Union Telegraph Company over the objection of the defendant then and there interposed that the same is irrelevant and immaterial to any issue in this case, said contract being: [omitted; printed side page 430 ante.]



[fol. 624] 24. The court erred in permitting plaintiffs to introduce in evidence a notice of condemnation by the Western Union Telegraph Company of January 18th, 1912, over the objections then and there interposed by the defendant, that the same was irrelevant and immaterial; the said notice being fully set forth in ground 21 of this motion is not here repeated.

25. The court erred (after admitting in evidence the testimony stated in paragraphs 19, 20, 21, 22, 23 and 24 of this motion to have been introduced by the plaintiffs and which plaintiffs claim were admissions by the defendant against its title to the easements in the land used by defendant in connection with its telegraph lines upon and along the Western & Atlantic Railroad from Atlanta, Georgia to Chattanooga, Tenn., and claimed by the plaintiffs to be admissions that the title to the right of way of the W. & A. R. R. was and is in the State of Georgia and to be an admission of necessity for condemnation by defendant to enable it to acquire the right to remain where it was in overruling the motion of the defendant then made and before the close of testimony in the case to exclude and strike out said testimony, and each and every part thereof, upon the following grounds:

The said testimony is not admissible as an estoppel because an estoppel has not been plead, and because no estoppel is alleged in the petition in this cause.

The condemnation proceedings do not amount to an estoppel or an admission by the defendant of lack of title in itself or of title in the State of Georgia, and an award in condemnation is no more than a quit claim.

The selection of the remedy of condemnation to protect and safeguard its telegraph lines and such right, title and easement in land as defendant possessed, proving to be no remedy, the selection of condemnation as a remedy amounts no estoppel.

The evidence does not show that the selection of a remedy of condemnation was with full knowledge of all facts and conditions. On the contrary it is apparent during the progress of this cause that [fol. 625] many conditions as to title were not known to the Western Union Telegraph Company at the time it made its selection of a remedy.

The condemnation proceedings did not actually or constructively mislead the plaintiffs.

The conduct and alleged admissions of the Western Union Telegraph were not, made with the knowledge of the entire truth by the Western Union of the condition of its title and rights.

The plaintiffs in this cause do not allege, claim or prove that they were ignorant of the true state of facts and conditions at the time the alleged admissions were made, and at the time the alleged remedy of condemnation was selected by the Western Union Telegraph Company.

The alleged estoppel relates to real estate, but it is not alleged or shown that the plaintiffs, or either of them, have been influenced by the acts, declarations or statements put in evidence as aforesaid, nor

is it shown that the plaintiffs, or either of them did not have convenient means of acquiring knowledge equal to that of the Western Union Telegraph Company.

There is no mutuality in the alleged estoppel.

There is no proof that the plaintiffs, or either of them relied upon, or acted upon, the alleged admissions, nor is there any proof that the plaintiffs or either of them changed their positions for the worse or were influenced or injured by these alleged admissions.

If the admissions are in disparagement of defendant's title, it is not an estoppel on defendant.

26. The court erred in refusing to permit defendant to prove by G. W. E. Atkins, a witness sworn in this cause for defendant, of the facts and circumstances leading up to and connected with the attempted condemnation proceedings to protect its telegraph lines and its title to easements upon or along the Western & Atlantic Railroad [fol. 626] from Nashville to Chattanooga. This evidence was sought to be introduced in rebuttal and in explanation of the alleged admissions claimed by the plaintiffs to have been made by the defendant in said condemnation proceedings and in said equity causes, instituted in the year 1912 in Fulton Superior Court, known as Nos. 24720 and 27274, referred to in Grounds 21, 22 and 24 of this motion. The facts which defendant then proposed and stated he expected to prove by witness G. W. E. Atkins being set forth in the following written statement submitted to the court at the time defendant sought to prove such facts by that witness.

[fol. 627] The defendant proposes to prove by G. W. E. Atkins, who has been sworn as a witness, that the notices given by the Louisville & Nashville Railroad Company and the railroad companies whose properties were leased or controlled by it, to the Western Union Telegraph Company, on or about August, 1912, to remove its lines of telegraph from the rights of way of said railroads, applied to lines of telegraph along about seven thousand miles of railroad, in which lines of telegraph were approximately fifty or sixty thousand miles of telegraph wire.

Both before and after the Western Union Telegraph Company notified the Louisville & Nashville Railroad Company that it desired the contract with it made 1884, to be terminated on or about August 17, 1912, the officers of the Western Union Telegraph Company, including G. W. E. Atkins, endeavored to negotiate and make with the Louisville & Nashville Railroad Company another contract to take the place of said contract of 1884, and G. W. E. Atkins was particularly charged with the duty of attempting to consummate a new contract.

These efforts at negotiation continued for some time, and the officers of the Western Union Telegraph Company, including G. W. E. Atkins, were hopeful that they would result in such a contract, but those officers finally reached the conclusion that it would be impossible to secure a new contract with the Louisville & Nashville Railroad Company and its affiliated and controlled lines, and believed that upon the termination of the contract of 1884, the Louisville &

Nashville Railroad Company and its affiliated or controlled railroad companies might interfere with its said lines of telegraph, and might take some forcible action interfering with the maintenance and operation of those lines of telegraph by the Western Union Telegraph Company and the transmission by it of messages thereover. Such [fol. 628] interference would be so serious in its character, both to the Western Union Telegraph Company and to the public, that the officers of the Western Union Telegraph Company, including G. W. E. Atkins, found it necessary to determine and settle upon some plan of action which would prevent such action and interference by said railroad companies. The officers of the Western Union Telegraph Company, including Theodore N. Vail, President, Newcomb Carlton, Vice-President, G. W. E. Atkins, Vice President, Rush Taggart, General Counsel and Geo. H. Fearons, General Attorney, conferred with each other and discussed the situation existing, the interference above mentioned which might exist upon the termination of the contract of 1884, and the course to be pursued to prevent such interference and the detrimental results which would thereby be occasioned.

The officers of the Western Union Telegraph Co. including G. W. E. Atkins, knew, by general repute, that the origin and early construction of the several lines of telegraph along many of the lines of said railroads were obscure; that many of those telegraph lines, and particularly those along the older trunk lines of said railroads, had been constructed thirty, forty or fifty years ago or longer, and some of the chief lines of telegraph had been probably constructed prior to the Civil War of 1861-1865; that those lines of telegraph had originally been constructed by a number of small telegraph companies which had, by consolidation, purchase or merger, been finally merged or consolidated into or become the lines of the Western Union Telegraph Company; that in like manner, many of said lines of railroad had been constructed thirty, forty or fifty years ago, and the older main trunk railroads had been constructed prior to the Civil War of 1861-1865; that those railroads had been built by many companies and, by consolidation, merger and purchase, had passed into various hands until they then were owned, leased, controlled or [fol. 629] operated by the Louisville & Nashville Railroad Company. The officers of the Western Union Telegraph Company, including G. W. E. Atkins, did not know under what deeds conveying easements, or under what contracts, all of these lines of telegraph had been constructed upon or along these railroads. The rights of the several telegraph companies constructing such lines, and their successors, to easements in land necessary for the construction and maintenance of said telegraph lines where now located, were obscure, and it was doubtful if research would disclose all of the facts connected therewith and all of the muniments of title and facts under which the Western Union Telegraph Company had or had a right to claim, easements in lands for such telegraph lines where located. Research for the ascertainment of all of such facts would necessarily consume a very large amount of time and entail large expense. The ultimate result of such investigation was quite uncertain, and

the probability was and is that, with the fullest research and investigation, all of the facts would not be ascertained, and even where the Western Union Telegraph Company had a perfect title to the easements in point of fact, it would probably be impossible to locate and ascertain all of the deeds, miniments of title and facts under which it was entitled to easements in land.

The officers of the Western Union Telegraph Company, including G. W. E. Atkins, knew that interference with said telegraph lines would not only cause the Western Union Telegraph Company and its stockholders great pecuniary loss, but knew that such interference would interfere with and prevent the discharge of its public duties as an agency of the government, that is of the United States and of the several States, and knew that such interference would greatly incommode the public, because that interference would prevent the transmission of telegrams along those lines of telegraph, and would [fol. 630] prevent the Western Union Telegraph Company from serving with those lines the various towns, cities and communities reached by said lines.

The officers of the Western Union Telegraph Company, including G. W. E. Atkins, did not know what right, title, interest or easement the Louisville & Nashville Railroad Company and the other railroad companies above mentioned had in land over, through or on which telegraph lines were located, nor whether said railroad companies possessed the land itself and all use thereof, or merely an easement therein or right of way thereover for railroad purposes, nor could such information be obtained except with great expense and after the consumption of several years' time.

The lines of telegraph which the Louisville & Nashville Railroad Company and its associated, affiliated and controlled railroad companies notified the Western Union Telegraph Company to remove, were situate in each of the States east of the Mississippi River and south of the Ohio River, with the exception of the State of South Carolina, and were also situate in the States of Indiana and Illinois. The officers of the Western Union Telegraph Company, including G. W. E. Atkins, then understood and believed that the laws of each of said States permitted a telegraph company to condemn an easement or right of way for telegraph lines upon or along all of the railroads in those States; that such condemnation proceedings were speedy, quickly determined, and that the amount of damages payable thereunder for rights of way for telegraph lines were nominal and insignificant in amount. The officers of the Western Union Telegraph Company, including G. W. E. Atkins, while understanding and believing that any rights which the Western Union Telegraph Company might have to easements in said States necessary for its said telegraph lines could be determined in courts of law or in equity, understood and believed that such proceedings would be ex-[fol. 631] pensive, and that litigation of that character would probably be very protracted and would continue through a number of years. The officers of the Western Union Telegraph Company, including G. W. E. Atkins, did not understand or believe that the institution of condemnation proceedings would be a waiver, relin-

quishment or abandonment of any right, title or easement in land possessed by the Western Union Telegraph Company, or would be any admission of a lack of a right, title or easement in land by the Western Union Telegraph Company; they believed condemnation proceedings to be a simple inexpensive method of making doubly sure the maintenance and protection of said lines of telegraph and of further fortifying and protecting such right, title and easement as the Western Union Telegraph Company possessed in any land for the construction, maintenance and operation of its lines of telegraph, and that any right, title, interest or easement then possessed by the Western Union Telegraph Company would not be affected or impaired by the institution of condemnation proceedings or anything done thereunder.

Under the circumstances and conditions above mentioned, the Western Union Telegraph Company and its officers, including G. W. E. Atkins, determined on a general policy to be pursued for the protection of its lines of telegraph along said railroads, and to prevent the threatened seizure thereof by said railroad companies and any interference by them with said telegraph lines. The said course of action so determined upon as a general policy was the institution of condemnation proceedings in each of the States in which those telegraph lines were situate for the purposes aforesaid, and for further assurance and muniment of title to easements upon or along the rights of way of said railroads for the construction, reconstruction, maintenance and *io*eration of said lines of telegraph.

Upon the adoption of said course of action as a general policy applicable to all lines of railroad involved condemnation proceed-[fol. 632] ings were instituted against each and all of said railroad companies, and without respect to any peculiar conditions which might exist or might be found to exist as to one railroad right of way which did not exist as to another railroad right of way.

27. The court having allowed plaintiffs to introduce in evidence a portion of the answer of the Western Union Telegraph Company in the suit brought against it by the Western & Atlantic Railroad in the Fulton Superior Court known as 24720, to which reference is hereinabove made in ground 21 of this motion, which suit plaintiffs admitted was still pending in said court, the court erred in refusing to permit defendant to introduce in evidence an amendment to said answer, and allowed subject to objection and ordered filed May 19, 1922 by the judge of this Honorable Court, and then filed, towit:

"FULTON SUPERIOR COURT

"No. 24720

"WESTERN & ATLANTIC RAILROAD COMPANY

"vs.

"WESTERN UNION TELEGRAPH COMPANY

"Now comes the Western Union Telegraph Company, defendant in the above cause, and, with leave of the court, amends its answer filed therein as follows:

"(1) By adding to Paragraph 9 of said answer the following:

"But defendant denies that either the lines of telegraph of the defendant upon, along, or over said right of way, or the land taken for said lines of telegraph, or the easements and rights of way in said land necessary for the construction, reconstruction, maintenance and operation of said lines of telegraph belong to the State of Georgia, but on the contrary alleges that said lines of telegraph and the land taken therefor and the easements necessary therefor are the property of the Western Union Telegraph Company, which is the owner thereof in fee simple.

"Defendant further says that the condemnation proceedings referred to in the petition in this cause were instituted by this defendant [fol. 633] without admitting or intending to admit that it was not the owner in fee simple of the easements sought to be condemned, but as a simple, expeditious, and economical means of obtaining by condemnation such further assurance of title and such reassurance of title as against the plaintiff and its lessee to thereby add to its other muniments of title and rights in and to said easements necessary for said lines of telegraph, and by condemnation to obtain what would be the equivalent of a quit claim of any possible right, title, or interest thereto which might be thought to be possessed by the plaintiff or any lessee thereof, and for the purpose of assuring the ability of defendant to continue, without disturbance or interference by the plaintiff or any lessee, the maintenance and operation of its lines of telegraph along the Western & Atlantic Railroad and the easements necessary therefor, and its ability therewith to continue uninterruptedly its quasi-public service.

"(2) Defendant amends Paragraph 11 of its answer by adding thereto the following:

"But defendant denies that either the lines of telegraph of the defendant upon, along, or over said right of way, or the land taken for said lines of telegraph, or the easements and rights of way in said land necessary for the construction, reconstruction, maintenance and operation of said lines of telegraph belong to the State of Georgia, but on the contrary allege that said lines of telegraph and the land taken therefor and the easements necessary therefor are the property

of the Western Union Telegraph Company, which is the owner thereof in fee simple.

"Defendant further says that the condemnation proceedings referred to in the petition in this cause were instituted by this defendant without admitting or intending to admit that it was not the owner in fee simple of the easements sought to be condemned, but as a simple, expeditious, and economical means of obtaining by condemnation [fol. 634] such further assurance of title and such reassurance of title as against the plaintiff and its lessee to thereby add to its other muniments of title and rights in and to said easements necessary for said lines of telegraph, and by condemnation to obtain what would be the equivalent of a quit claim of any possible right, title, or interest thereto which might be thought to be possessed by the plaintiff or any lessee thereof, and for the purpose of assuring the ability of defendant to continue, without disturbance or interference by the plaintiff or any lessee, the maintenance and operation of its lines of telegraph along the Western & Atlantic Railroad and the easements necessary therefor, and its ability therewith to continue uninterruptedly its quasi-public service.

"(3) Defendant amends paragraph 17 of its answer by adding thereto the following:

"But defendant denies that either the lines of telegraph of the defendant upon, along, or over said right of way, or the land taken for said lines of telegraph, or the easements and rights of way in said land necessary for the construction, reconstruction, maintenance and operation of said lines of telegraph belong to the State of Georgia, but on the contrary alleges that said lines of telegraph and the land taken therefor and the easements necessary therefor are the property of the Western Union Telegraph Company, which is the owner thereof in fee simple.

"Defendant further says that the condemnation proceedings referred to in the petition in this cause were instituted by this defendant without admitting or intending to admit that it was not the owner in fee simple of the easements sought to be condemned, but as a simple, expeditious, and economical means of obtaining by condemnation such further assurance of title and such reassurance of title as against the plaintiff and its lessee to thereby add to its other muniments of title and rights in and to said easements [fol. 635] necessary for said line of telegraph, and by condemnation to obtain what would be the equivalent of a quit claim of any possible right, title, or interest thereto which might be thought to be possessed by the plaintiff or any lessee thereof, and for the purpose of assuring the ability of defendant to continue, without disturbance or interference by the plaintiff or any lessee, the maintenance and operation of its lines of telegraph along the Western & Atlantic Railroad and the easements necessary therefor, and its ability therewith to continue uninterruptedly its quasi-public service.



"(4) Defendant strikes and withdraws any allegation in its said answer which may admit or which may seemingly admit any ownership or possession by the State of Georgia or any lessee thereof of any of the telegraph lines of defendant along the Western & Atlantic Railroad and any easements or rights in land necessary therefor, but expressly alleges that such lines of telegraph and all easements and rights in land necessary therefor are owned in fee simply by, and are and have long been in the exclusive possession of, the Western Union Telegraph Company.

"(5) Defendant alleges that the condemnation proceedings referred to in the petition in this cause have been dismissed by defendant and are no longer pending.

"Dorsey, Brewster, Howell & Heyman, Defendant's Attorneys."

28. The court having permitted plaintiffs to introduce in evidence a portion of the motion of defendant to advance the hearing in the case of Western & Atlantic Railroad vs. Western Union Telegraph Company in Fulton Superior Court, numbered 24,720, reference to which is hereinabove made in ground 21 of this motion and which suit plaintiffs' counsel admitted to be still pending in this court, the court erred in refusing to permit defendant to introduce in evidence the following amendment to said motion, to wit:

[fol. 636]

"FULTON SUPERIOR COURT

"No. 24720

"WESTERN & ATLANTIC RAILROAD COMPANY

"vs.

"WESTERN UNION TELEGRAPH COMPANY

"Petition for Injunction, etc.

"Now comes the defendant in the above cause and amends its motion filed in this court February 7, 1920:

"(1) By adding to Paragraph 3 thereof the following:

"Defendant denies that either the lines of telegraph of the defendant upon, along, or over said right of way, or the land taken for said lines of telegraph, or the easements and rights of way in said land necessary for the construction, reconstruction, maintenance and operation of said lines of telegraph belong to the State of Georgia, but on the contrary alleges that said lines of telegraph and the land taken therefor and the easements necessary therefor are the property of the Western Union Telegraph Company, which is the owner thereof in fee simple.

"(2) By adding to Paragraph 5 of said motion the following:

"Defendant denies that either the lines of telegraph of the defendant upon, along, or over said right of way, or the land taken

for said lines of telegraph, or the easements and rights of way in said land necessary for the construction, reconstruction, maintenance and operation of said lines of telegraph belong to the State of Georgia, but on the contrary alleges that said lines of telegraph and the land taken therefor and the easements necessary therefor are the property of the Western Union Telegraph Company, which is the owner thereof in fee simple.

"Dorsey, Brewster, Howell & Heyman, Defendant's Attorneys."

[fol. 637] 29. The court having permitted plaintiffs to introduce in evidence a portion of defendant's answer in the suit of the State of Georgia vs. Western Union Telegraph Company in Fulton Superior Court, numbered, 27,274, hereinabove referred to in ground 22 of this motion, the court erred in refusing to permit defendant to introduce in evidence an amendment to said answer allowed, subject to objection and ordered filed by the judge of this court May 19, 1922 and then filed, to wit:

"FULTON SUPERIOR COURT

"No. 27274

"STATE OF GEORGIA

vs.

"WESTERN UNION TELEGRAPH COMPANY

"Now comes the Western Union Telegraph Company, defendant in the above cause, and with leave of the court, amends its answer filed therein as follows:

"(1) Defendant strikes and withdraws Paragraph 5 of its answer, reading:

"5. Defendant admits the allegations of Paragraph 6 of said petition."

"And in lieu thereof defendant says:

"Defendant admits that the State of Georgia is the owner of the Western & Atlantic Railroad and of such easements or rights of way as are necessary therefor, but expressly denies that either the lines of telegraph of the defendant upon, along, or over said right of way, or the land taken for said lines of telegraph, or the easements and rights of way in said land necessary for the construction, reconstruction, maintenance and operation of said lines of telegraph belong to the State of Georgia, but on the contrary alleges that said lines of telegraph and the land taken therefor and the easements necessary therefor are the property of the Western Union Telegraph Company, which is the owner thereof in fee simple.

"(2) Defendant amends Paragraph 6 of its answer by adding thereto the following:

[fol. 638] "But defendant denies that either the lines of telegraph of the defendant upon, along or over said right of way, or the land taken for said lines of telegraph, or the easements and rights of way in said land necessary for the construction, reconstruction, maintenance and operation of said lines of telegraph belong to the State of Georgia, but on the contrary alleges that said lines of telegraph and the land taken therefor and the easements necessary therefor are the property of the Western Union Telegraph Company which is the owner thereof in fee simple.

"(3) Defendant strikes and withdraws any allegation in its said answer which may admit or which may seemingly admit any ownership or possession by the State of Georgia, or any lessee thereof of any of the telegraph lines of defendant along the Western & Atlantic Railroad and any easements or rights in land necessary therefor, but expressly allege that such lines of telegraph and all easements and rights in land necessary therefor are owned in fee simple by, and are and have long been in the exclusive possession of the Western Union Telegraph Company.

"(4) Defendant further amends its answer by alleging that the condemnation proceedings referred to in the petition in this cause were instituted by this defendant without admitting or intending to admit that it was not the owner in fee simple of the easements sought to be condemned, but as a simple expeditious and economical means of obtaining by condemnation such further assurance of title and such reassurance of title as against the plaintiff and its lessee to thereby add to its other muniments of title and rights in and to said easements necessary for said lines of telegraph, and by condemnation to obtain what would be the equivalent of a quitclaim of any possible right, title, or interest thereto which might be thought to be possessed by the plaintiff or any lessee thereof, and for the purpose of assuring the ability of defendant to continue without disturbance or interference by the plaintiff or any [fol. 639] lessee, the maintenance and operation of its lines of telegraph along the Western & Atlantic Railroad and the easements necessary therefor, and its ability therewith to continue uninterruptedly its quasi-public service.

"(5) Defendant alleges that the condemnation proceedings referred to in the petition in this cause have been dismissed by defendant and are no longer pending.

"Dorsey, Brewster, Howell & Heyman, Defendant's Attorneys."

30. The plaintiff having introduced evidence relative to condemnation by the Western Union Telegraph of easements of its telegraph lines along the Western & Atlantic Railroad, the court erred in refusing to permit defendant to introduce in evidence the following notice of the dismissal of condemnation:

"To the Western & Atlantic Railroad Company:

"This is to notify you that the Western Union Telegraph Company hereby dismisses the condemnation proceeding heretofore instituted against you, in so far as it affects the proceeding from Atlanta, Georgia, to the Tennessee State line at or near Graysville, Georgia, through the counties of Fulton, Cobb, Bartow, Gordon, Whitfield and Catoosa, State of Georgia, said original condemnation notice having been served upon you by service upon D. B. Carson, Agent in Atlanta, Georgia, January 19th, 1912.

"Dated April 5th, 1915.

"Western Union Telegraph Company, by H. C. Worthen,  
Its Duly Authorized Representative.

"Served the above notice on the Western & Atlantic Railroad Company by serving the original, of which the above is a copy on John Howe Peyton, as President of the N. C. & St. L. Ry. Co. Lessee of the Western & Atlantic Railroad Company, personally.

"This 10 day of April, 1915.

A. H. Stewart.

"Service of the above notice is hereby acknowledged.

"This April 10th, 1915.

Jno. Howe Peyton."

[fol. 640] Counsel for plaintiffs admitting nevertheless that condemnation proceedings referred to in Grounds 21 and 22 of this motion had been dismissed by the Western Union Telegraph Company, which gave notice to the State of Georgia and to the Western & Atlantic Railroad respectively to that effect.

31. The court erred in excluding the following testimony of Arthur Heyman, a witness sworn for the defendant, and material for it, and in refusing to permit Arthur Heyman to give evidence material for it, to-wit:

At the time of instituting the condemnation proceedings against the Western & Atlantic Railroad and against the State of Georgia in behalf of the Western Union Telegraph Company, which had been introduced in evidence in this cause, my only purpose in using the language which I used in those proceedings was to follow the clear rule laid down under the law of Georgia as to what was necessary in order to institute condemnation proceedings. Those statements were my conception of what the statute required to be set out in the notice in order to institute condemnation proceedings. I had no purpose to waive any rights that it might have had. My sole purpose was to conform to what the statute required for the purpose of instituting condemnation proceedings.

The court erred, during the examination of Arthur Heyman a witness sworn for the defendant, in making the following rulings, and each of them, excluding his testimony:

The witness had stated that he had prepared and had had served a condemnation notice, dated January 18, 1912 upon the Western & Atlantic Railroad, copy of which is set forth as Exhibit A in ground 21 of this motion. The witness had also testified that he had prepared similar condemnation notices addressed to, and which had been served on the Louisville & Nashville Railroad Company for its lines in Georgia, and the Georgia Railroad & Banking Company (whose railroad had been leased to the Louisville & Nashville Railroad Company and to the Atlantic Coast Line Railroad Company. Plaintiff's counsel objected to the testimony about the notices served upon the Railroad Companies other than the Western & Atlantic Railroad and the Nashville, Chattanooga & St. Louis Railway on the ground that the same are immaterial and irrelevant. This objection the court sustained.

Defendant's counsel propounded the following questions to the witness:

"Will you please state, Mr. Heyman, when you drew that notice which I have read, (the above mentioned notice of condemnation of January 18, 1912) whether in so doing you intended to convey the impression, that the Western Union Telegraph Company admitted that it did not own any easements to the right of way of the Western & Atlantic Railroad? Or, that it had no title to, or right to use and possess the easements necessary for its telegraph line then upon or along the Western & Atlantic Railroad?"

To this question plaintiffs' counsel objected on the ground with that the same was immaterial.

This objection the court sustained.

At this point defendant's counsel stated that they wished to state for the record what defendant expected to show by the witness, and the court thereupon said "It is so clearly inadmissible to my mind I will let you put in what you expect to show, but not in the presence of the jury."

The jury was then retired, and the defendant offered the following evidence and the court ruled thereon, as follows:

Q. Mr. Heyman, will you answer that question (the last above question)?

A. At the time of instituting these proceedings, the condemnation proceedings, I had and my firm had no information as to any rights or title that the Western Union Telegraph Company had along [fol. 642] the line of the Western & Atlantic Railroad. We made no investigation to ascertain what, if any rights, the Western Union Telegraph Company had along the line of the Western & Atlantic Railroad, and my only purpose in setting up that language was to follow the clear rule laid down, under the law of Georgia, as to what was necessary in order to institute condemnation proceedings.

Q. You mean you attempted to make the allegations of the notice conform to the statutory language?

A. Yes, my statements, or the statements that were put into this

notice, was my conception of what the statute required to be set out in the notice in order to institute condemnation proceedings.

Q. Now, Mr. Heyman, did you intend to convey to any one the impression, or did you mean by that language to admit, that the Western Union Telegraph Company did not have any easements for its telegraph lines along the Western & Atlantic Railroad, or did not own any easements of that character?

A. I had absolutely no information on the subject of the rights of the Western Union Telegraph Company, and I had no purpose to waive any rights that they might have had. My sole purpose was to conform to what the statute required for the purpose of instituting condemnation proceedings.

The Court: Is not that objectionable?

Mr. Clay: Your Honor excludes all of that?

Mr. Peeples: I can't object until it is offered as evidence.

Mr. Clay: Does your Honor decline to let us put in any of that answer?

The Court: What he intended to do and what he meant to do are clearly inadmissible. The question was, what did he do. The only doubt I have in my mind was whether or not to let him state what information he had in respect to these particular matters, or he was not in possession of at the time he wrote that notice, at the time he gave that notice.

Mr. Peeples: I have no objection to his stating he had no knowledge.

[fol. 643] Mr. Clay: That he had no notice and no knowledge.

The Court: I will let him answer that when the jury comes back, and the other part, what he intended to do, and the effect of it I exclude.

The court also ruled that Mr. Heyman could not state what he meant by the condemnation notice which he prepared.

The following questions were propounded, the following answers were given, and the following rulings were made while the jury had retired.

Arthur Heyman testified that he had had charge of the condemnation proceeding referred to in this ground of motion, and of the defense in the equity cause in this court #24720 and #27274, and prepared the notice of condemnation in those proceedings and the pleadings of the defendant, Western Union Telegraph Company, in those equity causes, the character of which are set forth in grounds 21 and 22 of this motion.

Q. You say in your answer (referring to answer in said equity cause #24720) "Defendant admits that it proposes to condemn the right of way held by petitioner, under said lease from the State of Georgia," and asks leave wherever material, to refer to said original condemnation notice. Will you please state what knowledge you had, if any, of the ownership by the State of Georgia of a right of way between Atlanta and Chattanooga for the Western & Atlantic Railroad.

A. I had no knowledge of the particular character of the right of way. I had a general knowledge that the State of Georgia owned the Western & Atlantic Railroad.

Q. Did you know, when you drew this answer whether the right of way which the Western & Atlantic Railroad or the State of Georgia owned was a title to land as land, or title to an easement in land only? Did you know what it was?

A. I had no information and no knowledge of the title of the State to the right of way at all. I only knew that there was a railroad known as the Western & Atlantic Railroad that belonged to the [fol. 644] State of Georgia that extended from Atlanta to Chattanooga, Tennessee.

Q. Did you know whether that is called the right *right* of way of the Western & Atlantic and to which it claimed title, was land as land, or just the use of the land only, just an easement in land for railroad purposes? Did you know what it was?

A. I did not.

Q. Did you make any investigation prior to this time to find out?

A. I did not.

Mr. Peeples: I object, to Mr. Heyman's stating as to what he knew about the title of the State.

The Court: I will rule it out when you get to it, I will not let you state it to the jury, I am just letting it go down here for the record. I don't think it is competent and I exclude it.

Q. Mr. Heyman when you drew this paragraph 17 of this answer (in said case #24720) did you have any knowledge what title, if any, the State of Georgia, had to the right of way referred to in the 17th paragraph of the petition and in the 17th paragraph of the answer.

A. I had no knowledge of the character of the title.

Q. Did you in point of fact know whether it was title by deeds from land owners, or prescriptive title against land owners?

A. I did not.

Q. Did you know whether that right of way designated in the 17th paragraph of the petition (in case #24720) and of the answer was land as land, and all uses to rights in land, or whether on the other hand it was only easements for railroad purposes in that land and over that land?

A. I did not.

Q. Did you make any investigation to ascertain about those facts? [fol. 645] A. I did not.

Mr. Peeples: We will object to that.

The Court: I will rule that out.

Mr. Clay: I would like to have it understood that the same questions I have asked about paragraph 17 is asked about, and as to paragraph 20, and same objection is made and same ruling is made—is that satisfactory.

Mr. Peeples: It is to me, if it is to the Court.

The Court: Yes.



A. I would like to state that in preparing that answer to the bill, as well as the amended bill, I made no investigation and made no inquiry of the home office, or any officer of the Western Union Telegraph Company either what was the character of the title of the State to that right of way, or what, if any rights the Western Union Telegraph Company already had to entitle them to stay there on the right of way, if they were on the right of way.

Mr. Peeples: That is objected to.

The Court: That is excluded.

Q. I will ask you whether, in preparing this answer, and the answer to the amended bill, you received any special instructions or directions from the Western Union Telegraph Company, or merely prepared it as defensive matter, as you thought should be answered, as counsel for the Western Union.

A. I don't recollect receiving any special instructions, or asking for any special instructions in connection with the matter, but I filed the answers to these bills in the nature of defensive matter in the effort to carry on the condemnation proceedings.

Mr. Peeples: I shall object to that.

The Court: I rule that out.

Q. And did you know, or did you make any investigation to ascertain [fol. 646] whether the State of Georgia owned what is called its right of way as land and all interest in that land, or only an easement for railroad purposes in it?

A. I didn't know and I didn't make any investigation to ascertain.

Mr. Peeples: I object to that.

The Court: Let all of that go out.

Q. I would like to ask this further question Mr. Heyman, in this 6th paragraph of your answer and in answer to the 7th paragraph of the petition, defendant admits it is its purpose to condemn such portion of the right of way in perpetuity. I would like to ask whether your purpose thereby was, or whether you intended, to convey the idea that the Western Union Telegraph Company did not have or possess any title to easements for its lines along the Western & Atlantic Railroad, or, if it had such easements, did it intend to abandon them?

A. I didn't know anything at all about any rights the Western Union Telegraph Company had along the right of way of the Western & Atlantic Railroad at that time. My sole purpose in using that language was that, with reference to the lessee, I had specified the purpose to condemn for the balance of the term, and when I thought I had to bring the State in and undertook to bring in the State, I wanted to cover the general condemnation against the State.

Q. In perpetuity?

A. In perpetuity.

Q. That is not all of my question. I wanted to ask whether you

intended to admit, or to concede, or to convey the idea, that the Western Union Telegraph Company admitted or conceded that it did not have any title to easements along that railroad for its telegraph lines? Did you intend any such admission, or to convey the idea of such admission?

A. I only intended, Mr. Clay, to institute a condemnation proceeding. I had no knowledge of any rights the Western Union had, and naturally could not have had the purpose of waiving any rights [fol. 647] about which I was unacquainted. I had no such purpose, and I didn't know about any such rights.

Mr. Peeples: We will object to all of that.

The Court: That should go out.

Mr. Heyman: I prepared the motion to advance the hearing in case #24720 and it is signed in my handwriting by my firm.

Q. Mr. Heyman, at the time this motion was prepared, or prior to that time did you know what title, if any, the State of Georgia had, to what is called the right of way of the Western & Atlantic Railroad.

A. I did not.

Q. I ask whether you intended to admit or to concede, or to convey the idea, that the Western Union admitted or conceded that it did not have any title to easements along that railroad for its telegraph lines? Did you intend any such admission or to convey the idea of such admission?

A. I did not.

Q. Did you make any investigation to ascertain what title, if any, the State had to this right of way?

A. I did not. I would like to add to both the statements I made awhile ago that my only knowledge was the State of Georgia owned this railroad from here to Chattanooga.

Q. That was a matter of public knowledge?

A. Yes that is a matter of public knowledge.

Q. And that was the knowledge you had?

A. Yes, that was all.

Q. Did you know at the time this motion to advance the hearing in case #24720 was prepared, whether the State of Georgia owned what is known as the right of way of the Western & Atlantic Railroad as land and all uses in that land, or only an easement for railroad purposes over the land?

A. I didn't know in what capacity they held that right of way.

Q. Or the character of the right of way.

A. Nor the character of it.

[fol. 648] Q. Did you make any investigation to ascertain?

A. I did not.

Mr. Peeples: I object to that on same ground as before.

The Court: I will exclude it.

Q. At the time of preparing and filing this motion, or prior thereto, did you know what right or title the Western Union Tele-

graph Company had to any easements in land for the maintenance and operation of its telegraph lines along the Western & Atlantic Railroad where they were situated?

A. I did not.

Q. Did you make any investigation to ascertain it?

A. I did not.

Q. Did you receive any instruction from the officers of the Western Union Telegraph Company in regard to making this allegation in paragraph 3 of this motion.

A. Mr. Clay I don't recollect receiving any instructions from the officers. My recollection is—I don't remember whether there was some request made to postpone the hearing. I think Mr. Tye like Mr. Howell appeared in the beginning of this case, and that they were asking for some postponement, and that Mr. Albert Howell suggested to me that our people had only a limited time in which this condemnation matter could be put through, and instead of postponing, we should move to advance, and acting on that suggestion, from Mr. Albert Howell, I think is the reason why I filed that motion. I had no instructions, as I recollect, from the Western Union Telegraph Company about it.

Q. That, so far as you recollect, is the sole purpose of the allegations of this motion.

A. Yes.

Mr. Peeples: We object to that.

The Court: That is ruled out.

[fol. 649] Mr. Peeples: By paragraph 5 it is alleged that it is only six months until the contract under which defendant occupies the right of way will expire.

Mr. Clay: I desire to ask the same questions about paragraph 5 as were propounded about paragraph 4, and expect to elicit the same answers.

Mr. Peeples: We make the same objection.

The Court: And the same ruling.

Q. Will you please state about the affidavit to the pleadings in cases #24720 and #27274?

A. In the case of the Western & Atlantic Railroad versus the Western Union No. 24720, Fulton Superior Court, the original answer was sworn to by L. H. Beck on March 6, 1912.

Q. Explain who Mr. Beck is and how he came to sign that affidavit?

A. I prepared that affidavit to be sworn to by Mr. H. C. Worthen who was the general manager here for that company. I don't recollect his title, and I found he was out of the city, and Mr. Beck, I understood, was the next officer in line, division plant superintendent, is my recollection, and I took that to Mr. Beck and explained what it was, and I told him that was in line with what had been done, and proper under the circumstances, and asked him to make that affidavit, which he made.

Mr. Peeples: And I shall object to that.

The Court: That is excluded.

Q. Now in the same case, the amendment sworn to by Mr. Worthen on the 30th day of January, 1913—please state who Mr. Worthen is and how he came to make that affidavit.

A. Mr. Worthen was general manager of the Southern Division of the Western Union Telegraph Company as I understood, I don't know his exact title, and I prepared this answer. I either took it or sent it to him with the request that he make the attached affidavit. I think I sent it to him and it was returned that way.

[fol. 650] Mr. Peeples: I object to that on the same ground.

Mr. Clay: Your Honor excludes that?

The Court: Yes.

Q. Now about the answer filed in this case 27420—you say Mr. Worthen was at that time, and is now, manager of the Southern Division of the Western Union Telegraph Company?

A. I think that is his title. I think I sent the answer to him with the affidavit prepared and asked him to execute it, which he did.

Mr. Peeples: I make the same objection.

The Court: Same ruling.

When the jury was recalled to the box the following questions were propounded, the following answers given, and the following rulings made.

The witness was asked why he filed the amendment to condemnation proceedings set forth in ground 21 hereof, and what fact caused it to be prepared and served. This amendment is set forth in ground 21 of this motion. Plaintiff objected to the witness answering the question, and the court sustained the objection. Counsel for defendant then stated that he wished to ask the witness about his knowledge of easements and title referred to in the equity suits No. 24720 and 27274 in Fulton Superior Court, more particularly set out in grounds 21 and 22 of this motion. To this plaintiff's counsel objected on the ground that the court had already announced that he would exclude such testimony. Thereupon the court ruled that he had excluded the witnesses' answers, except in so far as they related to the information he had and what he did with the papers, the court further stating that the witness had answered that he had no knowledge of those things.

Counsel for defendant then asked witness this question:

Mr. Clay: I wish to ask the question why it was he filed this amendment to the condemnation proceedings, and what fact caused it to be prepared and served.

[fol. 651] Mr. Peeples: I object to that.

The Court: I sustain the objection. You asked all those questions, and the court has ruled that he would not allow Mr. Heyman to answer.

Mr. Clay: Now I wish to go to these equity suits 24720 and 27274 and ask about his knowledge of the easements and title.

Mr. Peeples: They were all excluded.

The Court: I have excluded his answers except insofar as they relate to the information he had, and what he did with the papers, and he has answered here he had no knowledge of those things.

Mr. Clay: Let me see if I can put it all in one question.

Q. Mr. Heyman, when you prepared the answer to the original bill and to the amended bill in the case in this court, No. 24720, Western & Atlantic Railroad versus Western Union Telegraph Company, and when you prepared the answer to the petition in the suit No. 27274, State of Georgia versus Western Union Telegraph Company, and at the time that you made this motion to advance the hearing in No. 24720 in this court, in case of Western & Atlantic Railroad Company against the Western Union Telegraph Company, I will ask, if at any of those times or prior thereto, you had any knowledge yourself of what right, title or interest, if any, the Western Union Telegraph Company had in land or easements in land for maintenance, construction and reconstruction and operation of the Western Union Telegraph Company lines upon or along the Western & Atlantic Railroad?

Mr. Peeples: Those questions were asked by Mr. Clay and your Honor distinctly excluded every one of them.

Counsel for plaintiffs then stated that the court had distinctly ruled upon and excluded these questions and the answers thereto, and the court thereupon ruled as follows:

[fol. 652] The Court: The court heard this question asked, and in order to let him complete the record, the court sent the jury out and heard what the witness would answer to those questions if the court would permit it, and the court ruled that those answers that he would give were incompetent evidence.

Q. At the time these answers were prepared in these equity cases referred to, in this court #24720 and #27274, and at the time you made the motion to advance the hearing, did you make any investigation to find what right, title or interest, the Western Union had in land for the construction, reconstruction, maintenance and operation of its lines along the Western & Atlantic Railroad?

Mr. Peeples: I object for the reasons already stated.

The Court: I decline to let the witness answer.

Q. At the time you prepared these answers and amendments in the equity cases referred to, and that motion to advance the hearing in one of them, did you have any knowledge of what right, title and interest the State of Georgia had in land, for what is known as the right of way of the Western & Atlantic Railroad, and whether, if the State of Georgia had any right, title or interest in land for the right of way, it had title to land and all use and easement herein, or only title to an easement in land for railroad purposes?

Mr. Peeples: We renew objection, if your Honor please, on same ground as before.

The Court: I sustain the objection.

Q. Had you at or before the time you prepared these answers in the equity cases that have been mentioned and the motion to advance, any knowledge, or make any inquiry to ascertain what right, title or interest the State had, if any, in the right of way?

Mr. Peeples: I object to that for the same reason.

The Court: I sustain the objection.

[fol. 653] Mr. Clay: I don't think he has answered that.

The Court: He cannot answer it now; you can perfect the record later. If he has answered it I rule it out, and if he has not, instead of stopping now to complete the record by consent of the other side, he can put in later what he expects the witness to answer.

Mr. Clay: What he did state was he didn't have any knowledge and hadn't made any investigation. It is in the record for record purposes.

— When you prepared these papers and referred to the right of way of the Western & Atlantic, had you any thought or purpose of saying anything which would concede or imply the Western Union Telegraph Company didn't have easements or title.

Mr. Peeples: That has been objected to.

The Court: I have ruled that is an improper question, and I decline to let the witness answer it.

This movant shows that the foregoing rulings excluded testimony of Arthur Heyman who had charge of, and prepared, said condemnation notice and the amendment thereto, and the answers in said equity causes, and the motion to advance the hearing of one of them, which evidence is material to those pleadings, to the effect thereof and should be considered in connection with the claimed admissions, being explanatory thereof, and showing to what extent those claimed admissions should be binding upon the Western Union Telegraph Company. Said evidence showed that the condemnation notice was prepared in the language prescribed by the statute with no knowledge or investigation of the title of either party to land or easements therein, and without any intent, or purpose, to make any admissions, or to waive any rights in respect thereto; that the same were made with direction on the part of the Western Union Telegraph Company; that the answers in the equity causes were verified by Mr. Worthen and by Mr. Beck, local officers of the Western Union Telegraph Company, merely upon presentation by Mr. Heyman, the counsel for the [fol. 654] Western Union Telegraph Company with the statement that they were in form and proper.

The court also erred in refusing to permit the witness H. C. Worthen to answer questions propounded by defendant's counsel as to his knowledge or investigation of title and easements as appears from the following transcript of what occurred during the examination of this witness, to-wit:

Mr. Clay: I would like, for the sake of the record, to ask the same questions of Mr. Worthen that I asked Mr. Heyman as to his knowledge or investigation of title of the Western Union Telegraph Com-

pany, and as to easements for its lines along the Western & Atlantic Railroad; and also the question as to his knowledge, if any, as to the character of the right of way of the Western & Atlantic Railroad, and as to the title of the State, and its right or title or interest in the lands or easements in lands.

Mr. Peeples: We make the same objection — that.

The Court: The same ruling.

Mr. Clay: I now want to ask him the same question in regard to this answer in the case of the State of Georgia versus Western Union Telegraph Company, (27274) sworn to on January 30th, 1913. If my Brother will agree that such questions were asked and the answers were the same, it will be in the interest of time.

Mr. Peeples: I am willing to have it understood so, in the interest of time.

The Court: Very well; the same ruling.

This movant shows that this evidence was material, and defendant was entitled to have the same submitted to the jury, upon the same grounds, and for the same reason, that like testimony of Arthur Heyman was admissible and should have been submitted to the jury as above stated in this ground of this motion.

Error is assigned separately upon each of the foregoing rulings of [fol. 655] the court, excluding testimony of Arthur Heyman, and excluding testimony of H. C. Worthen herein set forth.

32. The court erred in refusing to permit defendant to introduce in evidence the following letter of August 5, 1912 from the Louisville & Nashville railroad to the Western Union Telegraph Company:

“To the Western Union Telegraph Company of New York:

“You are hereby notified by the undersigned, Louisville and Nashville Railroad Company, that on and after August 17th, 1912, the use and occupation by you of its railroad rights of way or any part thereof, situate in the States of Kentucky, Ohio, Indiana, Illinois, [fol. 656] Missouri, Tennessee, Virginia, North Carolina, Georgia, Alabama, Florida, Mississippi and Louisiana, and of its buildings, offices, stations, and premises or any part thereof, as and for a telegraph line composed of poles, cross-arms, wires, batteries, instruments, appliances and other fixtures, will be without its permission and against its will and consent.

“You are hereby further notified to vacate its said railroad rights of way, buildings, offices, stations, and premises, and to commence, in good faith, to remove therefrom immediately after August 17, 1912, and not later than September 1, 1912, all and singular the said poles, cross-arms, wires, batteries, instruments, appliances, and other fixtures composing your said telegraph line now and heretofore erected, operated, and maintained by you under the provisions of the written contract dated June 18, 1884, between you and the undersigned company, which you, by your written notice dated August 11, 1911, and received by the undersigned company August 17, 1911, volun-



tarily terminated upon the expiration of one year thereafter, to-wit: on August 17, 1912.

"You are hereby further notified and required to diligently and continuously prosecute said work of removal from its commencement as aforesaid, and to complete the same prior to December 1, 1912; and to enable you to do so within the period stated, the undersigned company hereby offers and undertakes to furnish all necessary and suitable engines and cars for that purpose, such cars to be loaded by your employes at and between stations on each of its several lines or divisions of railroad in said states, at such points thereon and at such times as may be reasonably designated by you in writing delivered, with proper shipping directions, to its General Manager, the undersigned company being afforded a reasonable opportunity to detach and remove its own wires, fixtures, etc., on such [fol. 657] poles, and to keep out of your way in said work of removal on your part; and the undersigned company further offers and undertakes to transport the said poles, cross-arms, wires, batteries, instruments, appliances, and other fixtures thus loaded at its regular legal rates to destination if on its own lines, and if not, then to deliver the same to its connecting lines, as in the case of the carriage of like commodities and materials for other shippers.

"You are hereby further notified that in the meantime and before you shall have effected such removal as aforesaid, all services rendered by you for or to the undersigned company, its officers, agents or employees, in the transmission of messages on or in the conduct of its business by telegraph over your wires in said telegraph line, or any portion thereof, or over any other telegraph line owned and operated by you, and in the receipt and delivery of such messages will be paid for by the undersigned company in cash or at the end of such month during said period between August 17, and December 1, 1912, at your regular legal rates and charges for like services rendered to other patrons; that between the dates last named the undersigned company will accept for furnishing office room and operators to transact your commercial business at points where you do not maintain a separate office, 25% of the receipts for messages received and forwarded to one of your offices, or received from one of your offices and delivered to addresses, and 50% of the receipts when received and delivered, by the agent of the undersigned company until your said telegraph line connecting therewith shall have been removed as aforesaid, but, in no event, longer than November 30, 1912; that the undersigned company will also in like manner pay you the reasonable value of the use of your wires as it may continue to use along its said lines of railroad, and in cities and towns [fol. 658] along the same or at the termini thereof after August 17, 1912, and prior to December 1, 1912, and for the use, if any, of the instruments, main and local batteries, terminal facilities, testing service, etc., for the operation of such wires as the undersigned company owns on said poles, as well as for such other services as you may perform for it between the dates last named.

"You are hereby further notified that, for all transportation and

other service rendered by the undersigned company to or for you, or your officers, agents or employes, after August 17, 1912, the undersigned company's regular legal rates and charges will be charged and collected from you in cash or at the end of each month during the period aforesaid.

"You are hereby further notified that all officers, agents and employes of the undersigned company to whom you have issued franks for the current year, by which their messages over your telegraph lines on or for the conduct of the business of the undersigned company, will be instructed to return to you such franks on or prior to August 17, 1912; and you are hereby requested to instruct all of your officers, agents, and employes to whom the undersigned company has issued passes for the current year over its lines or any of them to return such passes to its general manager on or prior to the last named date.

"You are hereby further notified That for your continued use and occupation, as and for a telegraph line, of the undersigned company's said rights of way, buildings, offices, stations, and premises, or any part thereof, in said states, or either of them, after August 17, 1912, and prior to December 1, 1912, you will be held liable and required to pay to the undersigned company the full value thereof, as well as all damages it shall sustain by reason or on account of being prevented from erecting, operating and maintaining its own telegraph or telephone line where the same has been located on its said rights of way, and by reason and on account of such use and occupation of its said rights of way and premises by you against its will and consent, and wrongfully and without right after the termination of said existing contract.

[fol. 659] "You are hereby further notified that in default of your vacating the undersigned company's said rights of way and premises, or in the event of your failure or refusal to remove therefrom your poles, cross-arms, wires, batteries, instruments, appliances, and other fixtures aforesaid, or any part thereof, *prior* to December 1, 1912, as in this notice hereinabove set forth, then and in that event, the undersigned company will take possession, appropriate, and use all and singular the said poles cross-arms, wires, batteries, instruments, appliances, and other fixtures, or so much thereof as may, on or after the last named date, be or remain on the undersigned company's said rights of way or premises in all or either of said states, and hold use, operate, maintain, or otherwise dispose of the same, as its own property, and refuse to longer permit you to remove or use the same in any manner or for any purpose, and will use all legitimate means in its power to prevent you from interfering with its possession, use, and ownership thereof.

"You are hereby further notified that inasmuch as the undersigned company cannot erect its own telegraph or telephone line where the same has been located on its said rights of way while your telegraph- line is there operated and maintained, the undersigned company will by necessity be compelled to make use of your existing telegraph poles and wires thereon for the transmission of

messages in the conduct of its railroad business until your said line is removed therefrom as hereinabove set forth, you will understand that such compulsory use of your poles and wires is not and must not be construed to be in acquiescence by the undersigned company in your continuance upon or continued use and occupation of its said rights of way.

"In witness whereof, the Louisville and Nashville Railroad Company has hereunto caused its name to be subscribed by M. H. Smith, its President, and its official seal to be affixed by J. H. Ellis, its Secretary, this the date first above written.

"Louisville and Nashville Railroad Company, by M. H. Smith, President. Attest: J. H. Ellis, Secretary."

[fol. 660] This movant contends said letter being material and pertinent because it preceded the condemnation proceedings introduced in evidence by the plaintiffs and referred to in ground 22 of this motion, and was one of the circumstances and conditions causing the institution of those condemnation proceedings therein referred to, and indicated the conditions, as subsequently disclosed by that letter, causing the institution of condemnation proceedings referred to in ground 21 of this motion.

33. The court erred in refusing to permit Arthur Heyman, a witness sworn for the defendant in this cause to testify about any condemnation proceedings instituted by him, or by the law firm of which he is a member in behalf of the Western Union Telegraph Company against the Louisville & Nashville Railroad and against any of its leased, owned, or controlled railroads or railroad companies (excepting only the Western & Atlantic Railroad), or the causes producing such proceedings and the purposes thereof. Said testimony being relevant and material in rebuttal and in explanation of testimony introduced by the plaintiffs relative to condemnation proceeding instituted against the Western & Atlantic Railroad Company and against the State of Georgia, which proceeding defendant desired to show was caused by the action of the Louisville & Nashville Railroad Company, and that the condemnation proceeding instituted with respect to the Western & Atlantic Railroad was merely a part of a plan to protect the telegraph lines of defendant along the entire system of the Louisville & Nashville Railroad.

[fol. 661] 34. The court erred after allowing plaintiffs, over defendant's objection, to introduce evidence relating to the condemnation proceedings and equity causes to restrain the same as set forth in paragraphs 21 and 22 of this motion to prove by Arthur Heyman, who had been sworn as a witness in the cause and who was counsel for the movant in said condemnation proceedings and in said equity causes, that neither the Western & Atlantic Railroad Company nor the State of Georgia ever appointed an assessor in response to the several condemnation notices addressed to and served on them respectively the court had previously ruled in Heyman's testimony that no assessor had been appointed by the W. & A. R. R. Co.; and

that neither of said equity causes had reached a trial in the merits. This testimony being ruled out by the court on the ground that the same was immaterial and irrelevant.

The court further erred in refusing to permit John S. Holliday a deputy clerk in this court, sworn as a witness for defendant, to testify from the records and dockets of this court that the equity causes mentioned in paragraph- 21 and 22 of this motion are still pending in this court and that the last entries on the dockets of this court are the entries of remittiters from the Supreme Court of Georgia in each of these cases, dated December 30, 1914, certified by the clerk of the Supreme Court of Georgia October 5, 1914, and filed in this court October 6, 1914; that these are the last entries in said causes with the exception of the amendments and the orders of court thereon filed in this court May 19, 1922, and hereinabove referred to in paragraphs 27, 28 and 29 of this motion, each of which amendments are marked filed by the clerk of this court May 19, 1922 and which in fact were then filed though no notation thereof had been made on the docket of the court at the time that the witness Holliday testified. The court ruled that such testimony was irrelevant and immaterial and that it made no difference as a matter of law whether these equity cases are still pending or not or whether they have or have not yet been tried.

35. The court erred in refusing to permit defendant to introduce [fol. 662] in evidence the relevant and material grant or permit given by an act of the General Assembly of Georgia, approved December 29th, 1847, entitled "An act to authorize the construction of the magnetic telegraph and providing for the protection of the same," copy of which is attached hereto as Exhibit "A".

36. The court erred in refusing to permit defendant to introduce in evidence the relevant and material copy of a mortgage from Augusta, Atlanta & Nashville Magnetic Telegraph Company to William Pylus and Samuel M. Scott, dated January 29th, 1855, a copy of which is attached to an amendment to defendant's original answer as Exhibit 15, with the certificate of the record thereof in the Superior Court of Richmond County, Georgia; copy of which is hereto attached as Exhibit "B". The evidence shows, search had been made for the original which could not be found.

37. The court erred in refusing to permit defendant to introduce in evidence the relevant and material copy of a mortgage from Augusta, Atlanta & Nashville Magnetic Telegraph Company to J. Washburn & Company, dated January 29, 1855, a copy of which is attached to an amendment to defendant's original answer as Exhibit 16, with the certificate of the record thereof in the Superior Court of Richmond County, Georgia; copy of which is hereto attached as Exhibit "C". The evidence shows search had been made for the original which could not be found.

38. The court erred in refusing to permit defendant to introduce in evidence the relevant and material copy of a mortgage from

Augusta, Atlanta & Nashville Magnetic Telegraph Company to Samuel Clark, dated March 17, 1855, copy of which is attached to an amendment to defendant's original answer as Exhibit 17, with the certificate of the record thereof in the Superior Court of Richmond County, Georgia; copy of which is hereto attached as Exhibit "D". The evidence shows, search had been made for the original which could not be found.

[fol. 663] 39. The court erred in refusing to permit defendant to introduce in evidence the relevant and material copy of a conveyance dated June 7, 1859 by Robert Wiggins, Sheriff Richmond County, Georgia, to A. D. Hammett, of properties of the Augusta, Atlanta & Nashville Magnetic Telegraph Company under an execution obtained by Camp & Hammett against said corporation in the Superior Court of Cobb County, Georgia, a copy of which is attached to amendment to defendant's answer as Exhibit 18, with the certificate of record thereof in the Superior Court of Richmond County, Georgia; a copy of which is hereto attached as Exhibit "E". The evidence shows search had been made for the original, which could not be found, and that the records of Cobb Superior Court Georgia had been destroyed during the Civil War 1861-1865.

40. The court erred in refusing to permit defendant to introduce in evidence the relevant and material certificate of the clerk of the superior court of Richmond County, Georgia, amending his certificate attached to the instrument named in the last four grounds of this motion, copy of which is hereto attached as Exhibit "F". No objection was made by the plaintiffs to the form of this certificate, but the same was objected to, and excluded, on the ground that the documents to which the certificate referred *was* irrelevant and immaterial, and that the certificate itself was irrelevant and immaterial.

41. The court erred in refusing to permit defendant to introduce in evidence the relevant and material copy of deed dated January 4, 1859, from John Y. Flowers Sheriff of De Kalb County, Georgia to A. D. Hammett, conveying properties of the Augusta, Nashville & Magnetic Telegraph Company under and by virtue of an execution issued against said corporation from the Superior Court Cobb County, Georgia, a copy of which is attached to an amendment to defendant's answer as Exhibit 19, with the certificate of the record thereof in the [fol. 664] Superior Court of De Kalb County, Georgia, copy of which is hereto attached as Exhibit "G". The evidence shows search had been made for the original which could not be found, and that the records of Cobb Superior Court Georgia had been destroyed during the Civil War 1861-1865.

42. The court erred in refusing to permit defendant to introduce in evidence the relevant and material copy of an agreement executed and delivered on the 12th day of August, 1853 by Alvin P. Hammett to William S. Morris et al., copy of which is attached to defendant's original answer as Exhibit 2; copy of which is hereto attached as Exhibit "H." The evidence shows search had been made for the

original which could not be found, and the copy offered in evidence is the copy recorded in an old record book of defendant containing copies of contracts and conveyances, which book was one of defendant's archives, and with the said copy therein was tendered in evidence, was produced by W. G. E. Atkins, the Vice President of defendant, in whose custody it had been in defendant's main office in the city of New York, N. Y. ever since his connection therewith in 1875 or 1880, and was found there when the witness entered that office.

43. The court erred in refusing to permit defendant to introduce in evidence the original relevant and material deed dated September 1st, 1858, from the said Alvin D. Hammett to said William S. Morris et al., a copy of which is attached to defendant's original answer as Exhibit 3, with the certificates of record thereof in the offices of the clerks of the Superior Courts of Catoosa, Cass, Gordon, Fulton and Whitfield, Georgia, copy of which is hereto attached as Exhibit "I."

44. The court erred in refusing to permit defendant to introduce in evidence the relevant and material copy of a deed dated November 13th 1858 from the said George L. Willy to William S. Morris [fol. 665] et al., copy of which is attached to defendant's original answer as Exhibit 4, with the certificate of record thereof in the Registrar's office of Hamilton County, Tennessee, copy of which is hereto attached as Exhibit "J." The evidence shows search has been made for the original which cannot be found.

45. The court erred in refusing to permit defendant to introduce in evidence the relevant and material copy of a deed dated December 28th, 1859, from said William S. Morris et al. to the American Telegraph Company, a copy of which conveyance is attached to defendant's original answer as Exhibit 5; copy of which is hereto attached as Exhibit "K." The evidence shows search had been made for the original which could not be found, and the copy offered in evidence is the copy recorded in an old record book of defendant containing copies of contracts and conveyances, which book was one of defendant's archives, and with the said copy therein was tendered in evidence, was produced by W. G. E. Atkins, the Vice president of defendant, in whose custody it had been in defendant's main office in the city of New York, N. Y. ever since his connection therewith in 1875 or 1880, and was found there when the witness entered that office.

46. The court erred in refusing to permit defendant to introduce in evidence the relevant and material copy of a report or letter of the Confederated Telegraph Company, copy of which is attached to an amendment to defendant's answer as Exhibit 20; copy of which is hereto attached as Exhibit "L." The evidence shows search had been made for the original which could not be found, and the copy offered in evidence is the copy recorded in an old record book of defendant containing copies of contracts and conveyances which book was one of defendant's archives, and with the said copy therein was

tendered in evidence, was produced by W. G. E. Atkins, the Vice President of defendant, in whose custody it had been in defendant's main office in the city of New York, N. Y. ever since his connection therewith in 1875 or 1880, and was found there when the witness entered that office.

47. The court erred in refusing to permit defendant to introduce in evidence the relevant and material original release, quit-claim and assignment dated June 20th, 1865 from the Confederate Telegraph Company to the American Telegraph Company, copy of which is attached to an amendment to defendant's answer as Exhibit 21; copy of which is hereto attached as Exhibit "M." G. W. E. Atkins Vice president of defendant, produced the original, testified it came from the archives of defendant in its main office in New York, was there when he entered that office in 1875 or 1880, and had been ever since in his custody.

48. The court erred in refusing to permit defendant to introduce in evidence the relevant and material original agreement dated June 12th, 1866 between the American Telegraph Company and defendant, copy of which is attached to the original answer of defendant as Exhibit 6, and the resolutions of the boards of directors of said American Telegraph Company and of said Western Union Telegraph Company respectively, ratifying and approving said agreement; copies of which are hereto attached as Exhibits "N," "O" and "P" respectively. The original minute books of those corporations containing said resolutions were produced by G. W. E. Atkins Vice president of Defendant and were offered in evidence and excluded.

49. The court erred in refusing to permit defendant to introduce in evidence the following relevant and material testimony of Carolyn Brodeur a witness sworn for the defendant in the above case:

"I, Carolyn Brodeur, am a stenographer in the office of Barrett & Hull, attorneys at law, Augusta, Georgia; in December, 1920, W. L. [fol. 667] Clay, of Savannah, requested said attorneys to have a search made of certain issues of the Augusta Chronicle in order to locate an alleged advertisement of the sale of a part of the line of the Augusta, Atlanta & Nashville Telegraph Company. I was delegated to make said search and went to the place of business of the Augusta Chronicle Company, examined the old files of said company and found that said advertisement appeared in the issues of the Augusta Chronicle on the following dates: Tuesday, May 10th, 1859; Tuesday May 17, 1859; Tuesday May 24, 1859, and Tuesday May 31, 1859.

"On January 8, 1921, I made an affidavit with reference to said advertisement and preserved a copy of said affidavit in the files of Barrett & Hull.

"I know that the description of said sale and the date of the issues of said paper were correct at the time I made said affidavit, and by reference to said paper I am able to state positively that said advertisement was as follows:



"Tuesday, June 7, 1859.

"Richmond Sheriff's Sale.—Will be sold at the Lower Market House in the City of Augusta, on the first Tuesday in June next, within the legal hours of sale, the following described property, to-wit: All that portion of the Augusta, Atlanta and Nashville Telegraph Line, together with the Wire, posts and all implements attached and belonging to said Line, with the Right of Way and Franchise, which is in the County of Richmond:

"Levied on as the property of the Augusta, Atlanta and Nashville Telegraph Line, to satisfy a fi. fa. issue from Cobb Superior Court, September Term, 1857, in favor of Camp & Hammett vs. the Augusta, Atlanta and Nashville Telegraph Line. Property pointed out by Plaintiff's attorney and levy made this April 22nd 1859.

"May 6, 1859.

"G. A. Parker, D. Sheriff'."

The evidence showed the original advertisement had been burned since the above copy was made.

[fol. 668] 50. The court erred in refusing to permit defendant to introduce in evidence the following relevant and material testimony of Andrew F. Burleigh, a witness sworn for defendant, to-wit:

Copies of the documents attached to this motion as Exhibits H, I, J, K, L, M, S, X, and W were exhibited to the witness who testified that those documents are not now and never were in his custody or control.

The witness produced and attached to his deposition minutes of the meeting of the board of directors of the Western Union Telegraph Company held June 14, 1866, being a correct copy of the original minutes as they appear in his custody, and a copy of the minutes of the Board of Trustees of the American Telegraph Company, held in the City of New York on the 12th day of June, 1866, which is a correct copy of the original minutes in his custody; copies of which are attached to this motion as Exhibits P and O; the original minutes from which said copies were taken have been in the custody and control of the witness as secretary of those two companies since his appointment to that office in November, 1916. The witness further testified: "I am familiar with the book 'The Telegraph in America, its founders, promoters and noted men' by Jas. D. Reid, and know that this book is looked upon as an authoritative history of the telegraph business and is used as such by telegraph people. I understand that Mr. G. W. E. Atkins will produce a copy of this book at the trial."

51. The court erred in refusing to permit defendant to introduce in evidence the copies of documents hereto attached as Exhibits I, J, and M, contained in the original record books of defendant, produced by witness G. W. E. Atkins, and by him described as book marked "A-2 Contracts W. U. Tel. Co." and book marked "C," and in refusing to admit in evidence said books. The evidence of the witness G. W. E. Atkins shows said books to be archives of defendant,

[fol. 669] containing copies of contracts, had been in the custody of the said witness in defendant's main office in New York when he entered it in 1875 or 1880 and continuously to the present time—The copies of said Exhibits I, J, M being identical with the certified recorded copy of Exhibit J and with the original of Exhibits I and M introduced in evidence, tended, this movant contends, to establish the accuracy of the records of other contracts therein, particularly of Exhibits H, K or L hereto attached, of which neither original nor recorded copy could be found.

52. The court erred in refusing to permit defendant to prove by Arthur Heyman and by G. W. E. Atkins, sworn as witnesses for defendants, when they respectively first discovered or knew of

(1) The contract between Garst & Bean and the Western & Atlantic Railroad, and the report of the Chief Engineer of that Railroad thereon to the Governor of Georgia, a complete copy of which is attached to an amendment to the answer in this cause, and is referred to in Paragraph 16 thereof as supplanting an inaccurate copy of the same attached to the original answer. The said contract between Garst & Bean shows on its face that it was made in the year 1850 the Chief Engineer of the Western & Atlantic Railroad thereby offered to Garst & Bean "to grant you the use of our right of way for the Telegraph Company." That offer was accepted by Garst & Bean.

(2) The act of the General Assembly of Georgia entitled "An act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company, approved January 27, 1852. Said act ratified and confirmed the above contract with Garst & Bean and granted to the Augusta, Atlanta & Nashville Magnetic Telegraph Company "power and authority to set up their fixtures along and across \* \* \* any railroad which now or may hereafter belong to this State."

(3) Mortgages made by the Augusta, Atlanta & Nashville Magnetic Telegraph Company, copies of which are attached to this motion as Exhibits B, C and D.

[fol. 670] (4) Conveyances by Sheriffs of Richmond and De Kalb Counties of properties of the Augusta, Atlanta & Nashville Magnetic Telegraph Company, copies of which are hereto attached as Exhibits E and G.

(5) The record in this court of the suit of Enoch R. Mills against Augusta, Atlanta & Nashville Magnetic Telegraph Company instituted in the year 1853, copy of which is hereto attached as Exhibits Q and Q-2.

(6) The record in the suit in this court of Alfred M. Coffin and the Augusta, Atlanta & Nashville Magnetic Telegraph Company instituted in the year 1860, copy of which is hereto attached as Exhibit R.

Defendant sought to introduce the evidence above referred to, plaintiffs objected thereto, and the court excluded the same as

appears from the following transcript of the report of the trial of this cause.

Mr. Clay :

Q. I want to ask you, Mr. Heyman, when the Garst & Bean Contract with Mitchell and the Act of 1851 or '52 incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company, was first known to you?

Mr. Peeples: We object to that on the ground it is irrelevant and immaterial.

The Court: I sustain the objection.

Mr. Clay: I would like to ask him if he knows when they were first discovered and how they were discovered?

Mr. Peeples: I object to that on same grounds.

The Court: I sustain the objection.

Mr. Clay: I would also like to ask Mr. Heyman, if he knows, when and by whom, and how the record in the Superior Court of Richmond County, of Mortgages which have been tendered in evidence here from Augusta, Atlanta & Nashville Magnetic Telegraph Company, and the Sheriff's sale and deed to Part of this property which have been offered in evidence, were first discovered?

Mr. Peeples: We object to that for the same reason.

The Court: I sustain the objection.

[fol. 671] Mr. Clay: I also wish to ask when and by whom the two records of cases in this Court, which were tendered the other day and testified to by Mr. Bloodworth, were first discovered or found? (Copies whereof are hereto attached as Exhibits Q, Q-2 and R.)

Mr. Peeples: We object to that for the same reason.

The Court: I sustain the objection.

G. W. E. ATKINS, recalled by Defendant.

By Mr. Clay:

Q. Will you please state when the Garst & Bean contract with Mitchell, which you have testified about in this case, and the Act incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Co. about the year 1851 or '52 was first known?

Mr. Peeples: I object to that as immaterial and irrelevant.

The Court: I sustain the objection.

Mr. Clay: I would like also to ask Mr. Atkins when the record of Mortgages from the Augusta, Atlanta & Nashville Magnetic Telegraph Co., recorded in Richmond Superior Court and the Sheriff's Deed recorded in Richmond Superior Court, conveying certain property in Richmond County, belonging to the Augusta, Atlanta, & Nashville Magnetic Telegraph Co., and the advertisement of the sale of that property by the Sheriff, were first discovered or known to the Western Union Telegraph Co. and by whom were they discovered?

Mr. Peeples: We object to that as irrelevant and immaterial.

The Court: I sustain the objection — that also.

On each of said rulings of the Court and on the exclusion of each portion of said testimony, the same being material, defendant assigns error.

53. The Court erred in refusing to permit defendant to introduce in evidence the following relevant and material testimony of Page Morris, taken by Commission, to-wit:

"I was born in Lynchburg, Virginia, June 30th, 1853, and will, therefore, be 69 years of age the 30th of next June. My father's [fol. 672] name was William Sylvanus Morris. I have no information of my own personal knowledge as to lines of telegraph in the southern states prior to, and during the civil war; and no information as to the lines between Atlanta, Georgia, and Chattanooga, Tennessee, along the line of the Western & Atlantic Railroad. The only information I have on that subject, if it may be called information, was obtained in conversations with my father long after the civil war, and I do not remember his having told me anything about the lines between Atlanta, Georgia, and Chattanooga, Tennessee, along the line of the Western & Atlantic Railroad. I think all that I know on this subject was embraced in the following letter of November 29th, 1915 to Mr. Albert T. Benedict of New York City, to-wit:

" 'United States District Court, District of Minnesota

" 'Page Morris, Wilbur F. Booth, Judges

" 'Duluth, Minn., November 29, 1915.

" 'Albert T. Benedict, Esq., General Attorney Western Union Telegraph Company, 195 Broadway, New York City.

" 'DEAR SIR: Mr. Thomas S. Wood of Duluth, Minnesota has forwarded to me your letter of the 17th inst. making inquiries in relation to records, letters and correspondence of the Confederate Telegraph Company.

" 'I am afraid that I cannot give you much information in regard to the matter concerning which you inquire. I will say this, however. My father was Dr. William S. Morris of Lynchburg, Virginia. Before the civil war he was a director in the American Telegraph Company, (I think that was the name of the company), and when the civil war broke out, at the request of the president and his fellow directors, he called a meeting of the stockholders of the company residing in the South, and organized a company for the purpose of taking over that part of the American Telegraph Company's property which was located within the limits of the Southern Confederacy, and managing its affairs while the war was on. I think the name of the southern company was the Southern Telegraph Company, and my father was elected by the stockholders its president. In this way he became the president and general manager of the telegraph lines which belonged to the American Telegraph Company within the limits of the Confederacy, and continued such management until the

end of the war. When the war was concluded the property of the Southern Telegraph Company was turned back to the American Telegraph Company or its successor, and the Southern Telegraph Company ceased to have further to do with it. These facts I learned in conversations with my father when I grew to be a man, after the civil war. What became of the records, letters and correspondence of the Southern Telegraph Company I do not know, and I never heard my father say. I think it possible that they were destroyed in the fire at Richmond on the day of the evacuation of the city by the Confederates. The Telegraph building was located in the fire zone, and as I recollect, was completely destroyed.

"Prior to becoming a director in the American Telegraph Com-[fol. 674] pany my father had been the president of what, as I recollect, was known as the Lynchburg & Abingdon Telegraph Company, which had built a very considerable mileage of lines in the southern states, beginning at Richmond, and running west through Lynchburg, Bristol and Chattanooga to Memphis, and southerly to various cities in the south like Charleston, Atlanta, Mobile and New Orleans.

"Several times before the war a consolidation was effected between this company and the northern company, and stock of the American Telegraph Company was issued to the stockholders of the Lynchburg & Abingdon Telegraph Company. Upon this consolidation my father became a director in the American Telegraph Company. It is possible that you will find in the records of the Western Union Telegraph Company all the records relating to the Lynchburg & Abingdon Telegraph Company at the time of this consolidation, and it may be possible for you to get other information which will be of value.

"If in your investigations you should find that there have been any inaccuracies in the above statements, I would be greatly obliged if you would let me know. I have for a long time been anxious to know the exact history of my father's connection with the telegraph. There may be some inaccuracies in my recollection of what he has told me concerning this matter.

"Yours very truly, Page Morris."

"I was, as you will see from the date of my birth, a boy only eight years old when the war broke out, and, of course, would know nothing about the lines of telegraph, except that my father had charge of them, with his headquarters at Richmond, Virginia. I wrote the letter above set forth. Of course, I thought the facts therein stated were true, but you will note by the letter I said there might be some inaccuracies. The letter speaks for itself.

[fol. 675] "I do not know what became of the records, if any, of the telegraph companies. As I state in my letter, I suppose any records which were in charge of my father, or the organization of which he was President, were probably destroyed in the fire which took place on the day that Richmond was evacuated.

"I never saw or heard of the letter (copy of which was exhibited to witness, that copy being identical with the copy attached to this motion as Exhibit "L"). The persons purporting to have signed it

were my father and Mr. Thomas H. Wynne, who was a friend of my father's in Richmond during the civil war. I have seen them a number of times together. The letter accords, with some difference in detail as shown by his letter to Mr. Sanford, with my recollection of the information which I received from my father in conversations I had with him when I grew to be a man. Of course, I knew nothing of my knowledge of the facts therein stated. I do remember my father telling me that he went to New York shortly after the war and turned over the lines and property which had been under his care during the civil war to the American Telegraph Company, and I suppose the letter attached to your interrogatory to Mr. Sanford was the report which he made at that time. My father died on the 20th of December, 1893. I do not know when Mr. Wynne died, or whether he is dead or not.

"My present occupation is that of a Judge of the United States District Court for the District of Minnesota. I have occupied that position since the first of July, 1903.

#### Cross-examination:

"My letter (above set forth) speaks for itself. From an examination of it it will be seen that all the information, if there is any in it, in addition to that contained in my father's report to the company after the war, was obtained in conversations with my father long after the civil war.

"I have no recollection as to the location of the various telegraph lines, except in a general way that they extended between the principal cities of the southern confederacy, and that my father was in [fol. 676], charge of them. The principal recollection that I have about the matter is the difficulties he had in keeping them up, as a boy I have many times been in the wire and glass factories which he was obliged to establish in order to do so."

54. The court erred in refusing to permit defendant to introduce in evidence the book entitled "Macon and Central Georgia" printed by the J. W. Burke Co., printers and binders, 1879, written by Jno. C. Butler, which counsel announced in his place came from the Carnegie Library of Atlanta, together with an affidavit made by Geo. C. Freeman in a case pending in the U. S. District Court for Southern District of Georgia, to which the Georgia Railroad and Banking Company, and the Louisville & Nashville Railroad Company, and the Western Union Telegraph Company are parties, counsel for defendant also stating in his place that George C. Freeman who made the affidavit, was a very old man when he made it, and has since died. The affidavit and the portions of Butler's book offered in evidence are the following:

"UNITED STATES OF AMERICA,  
 "Southern District,  
 "Northeastern Division of Georgia:

"In Equity

"THE WESTERN UNION TELEGRAPH COMPANY

"vs.

"GEORGIA RAILROAD AND BANKING COMPANY, LOUISVILLE & NASH-  
 ville Railroad Company, and Atlantic Coast Line Railroad Com-  
 pany

"Injunction, etc.

"GEORGIA,  
 "Chatham County:

"Before the undersigned, a Notary Public in and for Chatham County, Georgia, personally appeared George C. Freeman, who, being duly sworn, says that he was born in Macon, Georgia, A. D. 1833, and lived in that City until Nov. 6th in the year 1854, since which time he has continuously resided in Savannah, Georgia.

"While living in Macon, deponent knew well John C. Butler, which acquaintance continued through the life of John C. Butler, [fol. 677] who died after the Civil War of 1861-1865. Said John C. Butler was clerk and office boy for the Telegraph Company first establishing an office in Macon, Georgia about the year 1848. He was one of the first telegraph operators in Georgia; acted as telegraph operator for a considerable time in Macon, Georgia, about the year 1853 became acting superintendent at Macon, Georgia for the Washington & New Orleans Telegraph Company for the territory of Georgia and a portion of Alabama. He continued to hold this position for the Washington & New Orleans Telegraph Company and its successors for a long period of time, and was actively connected with telegraph companies having lines and offices at Macon, Georgia, for a long time, where he lived until his death. He was the author of a book entitled "Historical Record of Macon and Central Georgia" by John C. Butler, printed 1879. He was a man of veracity, careful and accurate in statement, and had excellent sources of information about the history of Macon and Central of Georgia during the period covered by the said book of which he was the author. He had exceptional opportunity for accurately stating matters and facts connected with *with* the early history of telegraphy in Georgia. The book above mentioned, of which he was the author, is generally regarded as a reliable chronicle of events which had transpired previous to its publication, and deponent believes that the statements contained in that book are entitled to belief, and that the book is entitled to be regarded as a correct chronicle of events mentioned therein. Deponent believes that said book is so regarded by the public generally and by persons who had knowledge of the events therein mentioned.

"The attached five pages marked Exhibit A is a correct copy of a



portion of said book stating matters and facts connected with the early history of telegraphy.

"This affidavit is made for use as evidence in the above stated cause.

"Geo. C. Freeman.

"Sworn to and subscribed before me this 2nd day of May 1916. Jas. H. Bolshaw, Jr., Notary Public C. C., Ga. (Notarial Seal.)"

[fol. 678] "Extract from "Historical Record of Macon and Central Georgia," by John C. Butler

Printed 1879

Pg. 179: "During the year 1848 the Electro-Magnetic Telegraph was introduced into Augusta and Savannah, and through the public spirit of Elam Alexander and Dr. Robert Collins, the main line was brought to Macon, and through the enterprise of Daniel Griffin, of Columbus, it was conducted to that place on the route from Washington to New Orleans.

"The distance of the contemplated line from Washington to New Orleans, was, at that time, seventeen hundred and sixteen miles. The contract for raising the money from Southern subscribers, and for building the line, was given to John D. Haley, of New York, who, in some instances, sub-let contracts and appointed agents. The stock being raised as far as Augusta, efforts were made to secure subscribers in Macon without success. The necessary amount had been subscribed from Montgomery to New Orleans. Mr. Haley, who had failed to get any subscriptions in Macon, was about to establish his line on the upper route, via Atlanta and West Point to Montgomery. At this time the Chamber of Commerce, of Savannah, agreed to take \$15,000 of the stock. Mr. Alexander was then on a visit to Savannah and liberally proposed to take the whole subscription alone from the Chamber of Commerce if the line was brought to Macon. \$10,000 of the stock was transferred to Mr. Alexander who at once saw Mr. Haley and subscribed for \$7,500 more, of which amount, on his return to Macon, Robert Collins took from him \$2,250. The citizens in Savannah, and the Central Railroad Company increased their stock list to over \$25,000. Daniel Griffin, of Columbus, took \$6,500, which induced other citizens to take \$4,000 more.

"It is a remarkable coincidence that Messrs. Collins and Alexander, who were so prominently identified in the construction of 'the [fol. 679] longest railroad in the world,' and were builders of thirty miles of that road, nearest to Macon, should have been the only subscribers to the stock, in the same city, of the longest Tel. Line, built by one company, at that time, in the world.

"The line was completed to Macon and the office opened in the second story of the Floyd House, on the corner of the alley, on Third Street, on the 8th of April, by David M. Ring, of Charleston, the

operator in charge, with Master J. C. Butler, Clerk and office boy, who, in three months, became assistant operator.

"On the 19th day of July the several contractors to New Orleans completed the work, and the line was opened to New Orleans and Washington City.

"The first meeting of the stockholders was held in Washington City in September, and the 'Washington and New Orleans Telegraph Company' organized by the election of Daniel Griffin, of Columbus, Georgia, President; Amos Kendall, of Washington, Treasurer, and George Wood of Washington, Secretary. Alfred Vail, of Washington, and Charles S. Bulkley, of New York, were appointed Superintendents. In July, 1849, Elam Alexander was elected President, Mr. Kendall, Treasurer, and Henry L. Jewett, Secretary. Mr. Jewett resigned in a few months, and Daniel F. Clarke was appointed Secretary. This administration continued four years, with Charles S. Bulkley, General Superintendent, who resigned during the fourth year, and was succeeded by Thomas R. Hopkins, of Virginia. In July, 1853, Mr. Hopkins resigning, J. C. Butler was Acting Superintendent. In 1854, Amos Kendall was elected President, and the system of management was changed. Heretofore the line had been kept up by contractors, under forfeit, for a certain amount, every hour it went down on their respective sections. Mr. Kendall abolished the contract system, and divided the entire line into four sections and appointed four Superintendents: J. R. Dowell, over the first section, embracing Virginia and a portion of North Carolina; W. H. Heiss, over the second, a portion of North and South Carolina; J. C. Butler, over the third, Georgia and a portion of Alabama, and J. K. Mingle, over a portion of Alabama and Louisiana, which was the fourth section. Mr. Mingle resigning shortly afterwards, the fourth section was merged into the superintendency of the third. Mr. Kendall continued President until July, 1856, when the lines were leased for ten years to the Magnetic Telegraph Company, located between Washington and New York. Under the contract the lessees were to pay annually to the lessors four per cent dividend on their stock, rebuild their line whenever necessary, with the most improved and substantial materials, and to transfer the route alongside of railroads as soon as they were built.

"In 1859 the Magnetic Company transferred the lease, together with their own property, to the American Telegraph Company, who retained the Washington and New Orleans line under their title until the war between the States.

"The yield of the Southern lines was a vast tributary to the treasury of the American Company, and they were loath to part with it when the many interests in the Sovereign States under the ægis of *E Pluribus Unum* became no longer 'many as the billows, and one as the sea.'

"In 1861 the Confederate Congress, at Montgomery, for the protection of the privacy of official dispatches and the operations of the Confederate Departments generally, passed the telegraphic oath, which all officers and employees on the lines were required to take or leave the Southern country; and the lines became a portion of the

War Department, and the employees subject to be detailed for such telegraphic service in military operations as might be required of [fol. 681] them to perform. There were none others than the professional telegrapher who could perform such service; hence they were enrolled as an indispensable adjunct to the War Department. Mr. Lincoln's Government adopted the same course. The fall of Sumter and the hoisting of the standard of the young Confederacy over the ramparts of that Fort was announced to the Northern people over Southern wires. It is probable the intelligence was not acceptable to Mr. Lincoln, and he concluded to cut further telegraphic acquaintance with the South; for shortly after the reduction of Sumter he ordered all of the wires crossing the Potomac and leading into the Confederate Domain to be severed. In order to retain control of the lease of the Southern line, the American Company made a bogus contract with a party in Virginia who owned stock in the Northern, but none in the Southern lines, to establish themselves as a new company ostensibly, but were virtually only secret agents. For the security of confidence among the credulous and unsuspicious Southerners, the new organization assumed, without a charter, the popular title of "The Southern Telegraph Company." The Confederate War Department, however, during the whole war exercised, for military purposes a partial control over the lines. After the close of the war 'The Southern Telegraph Company,' so-called, as naturally as at night-fall 'young chickens go home to roost' repaired to the office of their masters, on Wall Street and rendered a report of their faithful stewardship for the four preceding years. The remarkable and anomalous spectacle was now unfolded to the world of a corporation whose only executive office and whose entire energies and sympathies were upon the Northern Side, should, during the very heat of war furnish their opponents with the only rapid medium of communication for army purposes, and which was so indispensable an adjunct to the operations of their War Department. It was a skillful act of diplomatic wire-working, and was executed in all the [fol. 682] expectations of its projectors with dexterous magnetic management. After the close of the war the United States military extended their surveillance over the offices of the Southern lines, though all reports and deposits were sent to the treasury of the American Company.

"The last extension of the Morse patent expired during the war, and the Federal Congress refused to grant a renewal. The excitement in speculations incident to the superabundance of Greenbacks and bonds which had been issued, and the necessity for military purposes produced a greater demand for telegraphs at the North; and as the expense for the patent right was extinguished, many new companies were formed and lines were built. Previous to the War the Western Union Company had been established, and had become one of the leading companies in the North and West. They were buying out the new companies and were looking towards the South as a territory for more business. The great competition between the large companies crowded out the smaller ones, who were forced to

sell out to them. In 1866 the American Company amalgamated with the Western Union, under the title of the latter, which forced several others to follow the same policy, and within the last ten years their lines have extended almost as thick as mail routes throughout the entire Union, and for extensiveness of operations it is the leading company throughout the world."

The testimony so excluded was material evidence for defendant.

55. The court erred in refusing to permit defendant to introduce in evidence the book entitled "The Telegraph in America. Its Founders, Promoters and Noted men, by Jas. D. Reed," published New York, Derby Bros., 1879, and particularly the following portion thereof:

"Confederate Telegraph Company

"At the outbreak of the Civil War in 1861, the lines of telegraph [fol. 683] in the Southern States owned, operated or controlled by the American Telegraph Company were taken possession of by southern stockholders and officers, who organized the Confederate Telegraph Company. The Confederate Telegraph Company operated the lines within the Southern States and from Richmond to Augusta, Georgia, thence to Atlanta along the Georgia Railroad, thence to West Point along the Atlanta & West Point Railroad, thence to Montgomery over what is now the Western Railway of Alabama, and thence to Mobile and on to New Orleans along lines now owned or controlled by the Louisville & Nashville Railroad Company, and from Atlanta along the Western & Atlantic Railway to Chattanooga, and thence north and east into Tennessee, North Carolina and Virginia.

"Upon the termination of the Civil War, the officers of the Confederate Telegraph Company returned all of the telegraph lines in their possession to the American Telegraph Company.

"The American Telegraph Company in the year 1866 sold and conveyed all of its lines of telegraph to the Western Union Telegraph Company, which has continuously since that time owned and operated the same."

The testimony so excluded was material evidence for defendant.

56. The court erred in refusing to permit defendant to introduce in evidence a certified copy of the record of the suit of Enoch R. Mills against the Augusta, Atlanta & Nashville Magnetic Telegraph Company in this court, and in which judgment was obtained against the defendant in the cause April 28, 1858, a copy of which is hereto attached as Exhibit "Q." This movant contends that this evidence is particularly material and relevant in view of the fact that plaintiffs' counsel had contended that it did not appear that the Augusta, Atlanta & Nashville Magnetic Telegraph Company, though chartered, was ever organized, had ever accepted its charter, or had actually come into being; furthermore, recitals in this record show the construction and operation of a line of telegraph by the Augusta, Atlanta & Nashville Magnetic Telegraph Company from

Augusta, Georgia, by way of Atlanta, and Chattanooga to Nashville in the State of Tennessee; that the company was organized, had offices; was engaged in business, and the record was otherwise relevant and material.

57. The court erred in refusing to permit defendant to introduce in evidence a certified copy of entries in the records of this court showing that in the case of Enoch R. Mills for the use of J. G. Mills a judgment was rendered April 28, 1958 for \$1,652.36, against the Augusta, Atlanta & Nashville Magnetic Telegraph Company upon which an execution was issued May 6, 1858, and on that execution a return of nuda bona was made. This evidence is particularly relevant and material, showing the actual existence of the Augusta, Atlanta & Nashville Magnetic Telegraph Company, its financial difficulties in the year 1858, and is otherwise relevant and material, copy of which is hereto attached as Exhibit Q-2.

58. The court erred in refusing to permit defendant to introduce in evidence a certified copy of the record of Alfred M. Coffin vs. Augusta, Atlanta & Nashville Magnetic Telegraph Company pending in this court the year 1860, copy of which is hereto attached as Exhibit "R."

This movant contends said evidence is particularly relevant and material as showing that in the year 1859 the Augusta, Atlanta & Nashville Magnetic Telegraph Company was in actual existence and doing business and the plea of the defendant in that case shows that in the year 1860 the properties of the Augusta, Atlanta & Nashville Magnetic Telegraph Company were operated by the American Telegraph Company.

[fol. 685] 59. The court erred in refusing to *refusing to* permit defendant to introduce in evidence contract from the State of Georgia with the Western Union Telegraph Company dated August 18, 1870, copy of which is hereto attached as Exhibit "S" and the original of which duly proven was tendered in evidence. The preamble of said contract recites that it was entered into

"in order to provide necessary telegraph facilities for the party of the second part (W. & A. R. R.) and to a better understanding of the terms on which the party of the first part (W. U. T. Co.) shall occupy the line of railroad of the party of the second part with the line or lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto."

By this agreement the State of Georgia in the premises granted and conveyed to the Western Union Telegraph Company

"Perpetual right of way to erect and maintain telegraph lines along said railroad of as many wires as it may deem necessary to its business, and additional lines of poles whenever" the Western Union Telegraph Company shall so elect,

Said contract being relevant and material evidence for defendant.

60. The court erred in refusing to permit defendant to introduce in evidence a certified copy of the record of the suit in the United States Circuit Court for the Northern District of Georgia, in which the Western Union Telegraph Company brought suit against the Western & Atlantic Railroad, the lessee of the State of Georgia, in the year of 1872 to recover money which it claimed was due it by the said Western & Atlantic Railroad for the use of one of its wires, and certificates rendered said railroad company in accordance with the provisions of the contract of August 18, 1870 between the State of Georgia and the Western Union Telegraph Co. and in which suit and cross bill was filed by the State of Georgia, which resulted in a judgment in the Supreme Court of the United States. [fol. 686] sustaining the claims of the Western Union Telegraph Company and upholding its rights under said contract. A copy of which suit and of the decision of the Supreme Court of the United States herein is hereto attached as Exhibits "T" and "U" respectively. Said record and decision being relevant and material evidence for defendant.

61. The court erred in refusing to admit in evidence a letter dated September 12, 1876 from William McRae, General Superintendent Western & Atlantic Railroad, dated September 12, 1876, which had been duly identified and proven. Copy of this letter is hereto attached as Exhibit "V." This letter shows the recognition of the validity of the above mentioned contract of August 18, 1870 between the State of Georgia and the Western Union Telegraph Company. Said letter being relevant and material evidence for defendant.

62. The court erred in refusing to admit in evidence resolutions of the Executive Committee of the Western & Atlantic Railroad Company at a meeting held September 11, 1876, copy of which is attached hereto as Exhibit "W," being the resolution mentioned in the last above ground of this motion for new trial, and recognizing the validity of said contract of August 18, 1870 between the State of Georgia and the Western & Atlantic Railroad.

Said resolution being relevant and material evidence for defendant.

63. The court erred in refusing to admit in evidence the receipt of the Western Union Telegraph Company of September 11, 1876, duly proven for \$4,000.00 received from the Western & Atlantic Railroad in full and complete settlement of the litigation between the Western Union Telegraph Company and the Western & Atlantic Railroad Company in the United States Circuit Court in the Northern District of Georgia, referred to in Ground 60 of this motion. A copy of this receipt is hereto attached as Exhibit "X."

Said receipt being relevant and material evidence for defendant.

64. The Court erred in refusing to admit in evidence the resolution of the General Assembly of Georgia, approved October 22, 1877 (Georgia Laws 1887) pg. 911) "directing the Governor to instruct

the Attorney General to examine into the facts and circumstances [fol. 687] of the contract of August 18th, 1870, referred to in Ground 59 of this motion, and if it shall appear that there are good grounds to authorize the rescinding of that contract that proceedings *to that end be instituted by the Attorney General.* Copy of this resolution is attached hereto as Exhibit "Y."

Said resolution being relevant and material evidence for defendant.

65. The court erred in refusing to permit the defendant to introduce in evidence joint resolutions of General Assembly of Georgia, approved December 19, 1893 (Georgia Laws 1893 pg. 501) directing the Governor and Attorney General to examine and inquire into all trespasses, encroachments and occupation of the properties connected with the Western & Atlantic Railroad and the rights of way of said railroad, and after such examination and inquiry to affect, if possible, a settlement in each such instance on such terms as will be fair and equitable and with further provision that if in any instance settlement could not be reached legal proceeding be instituted by the Governor and Attorney General when deemed best to protect the interest of the State to protect, define or determine the rights of the State. A copy of this resolution is hereto attached as Exhibit "AA."

Said resolution being relevant and material evidence for defendant.

66. The court erred in refusing to permit the defendant to introduce in evidence a joint resolution of the General Assembly of Georgia approved December 18, 1894 (Georgia Laws 1894, pg. 283) directing a special Commission therein created to act as a court of law and equity to investigate and determine all matters of controversy and issues between the State of Georgia and others relating to the Western & Atlantic Railroad, its rights of ways and properties; directing said commission to consider all writings, papers, documents and legal records as may be pertinent to the issues involved, whether the same may be admissible evidence under the strict rules of law or not; to give such force and effect thereto as the Commission should think right and proper and with further provision [fol. 688] vision that the judgment or decree of the Commission should be so moulded in each case as to shape and give effect to all rights and equities of the parties in the subject matter. A copy of this resolution is hereto attached as Exhibit "BB."

Said resolution is relevant and material evidence for defendant.

67. The court erred in refusing to submit as evidence to the jury and erred in excluding from the consideration of the jury the following testimony of J. M. Stevens, a witness sworn for the defendant, and who testified that he had been employed by the Western Union Telegraph Company in Atlanta from 1869 to 1913; being operator in Atlanta in 1869, subsequently General night operator and Chief Operator; in 1892 Operator and Manager of the office in Atlanta; from 1892 to 1913 District Manager and District Superintendent in charge of lines extending from and including South Carolina and Texas and including the lines along the Western & Atlantic Rail-



road, both in Georgia and in Tennessee. The questions asked of the witness and his answers thereto which were excluded by the court from the consideration of the jury and which is assigned as error is the following:

Q. Mr. Stephens, have you ever known or not of any action brought by the State of Georgia, other than this action, or any action by a lessee of the State of Georgia, against the Western Union Telegraph Company, or any action against it to move its poles and wires off the right of way, or to oust it of its easements?

A. No, sir.

Q. Do you know of any proceeding or action or effort of any kind brought by the State of Georgia to oust the Western Union Telegraph Company, its wires and lines, from its position along the Western & Atlantic Railroad where you have described them to be?

A. I know of no such action; I don't know of any action.

Q. In your connection with the Western Union and your duties towards its lines, I will ask you whether you would have known [fol. 689] of any such action or proceeding or effort, if there had been any—

Mr. Clay: I asked him if his connection with the Western Union Telegraph Company, and his duties towards it were of such a character, and his connection with it was such that he would have known of any action brought by the State of Georgia, if it had been brought, to eject the Western Union and its lines and easements, and I would like to have him answer that.

A. I certainly would have known about it if there had been such action.

Q. And you have never heard or known of such action?

A. No, sir.

Q. Has any such action or proceeding ever been brought against the Western Union prior to this?

A. None that I know of.

Q. Since you came to Atlanta?

A. No.

Q. You say you would have known of it?

A. I certainly would.

Said testimony is relevant and material evidence for defendant.

68. The court erred in refusing to admit in evidence a resolution of the General Assembly of Georgia, approved December 21, 1839 (Georgia Laws 1839 p. 227) providing for the establishment of a highway along the Western & Atlantic Railroad. Said resolution is material evidence for the defendant and was offered in evidence by it, and copy thereof is hereto attached as Exhibit "CC."

69. The court erred in refusing to admit in evidence the resolution of the General Assembly of Georgia, approved February 23, 1850 (Georgia Laws 1849-50, p. 339), providing for the payment for right of way for said railroad and prohibiting the State from

pleading the Statute of Limitations. Said resolution is material [fol. 690] evidence for the defendant, was offered by it in evidence and copy thereof is hereto attached as Exhibit "DD."

70. The Court erred in refusing to admit in evidence an Act of the General Assembly of Georgia, approved December 14, 1859, Georgia Laws 1859, page 313, granting rights of way to the Dalton & Gadsden Railroad on the right of way of the Western & Atlantic Railroad. This act is material evidence for the defendant, was offered in evidence by it, and a copy thereof is hereto attached as Exhibit "EE".

71. The court erred in refusing to permit in evidence an Act of the General Assembly of Georgia, approved December 20, 1860 (Georgia Laws 1860, page 193), granting to the Georgia Western Railroad rights of way on the Western & Atlantic Railroad. This act is material evidence for the defendant, was offered in evidence by it, and a copy thereof is hereto attached as Exhibit "FF".

72. The court erred in refusing to admit in evidence an Act of the General Assembly of Georgia approved October 25, 1870 (Georgia Laws 1870 pg. 377), granting the proprietors of the Kennesaw House the right to rest pillars of the verandah of that house upon the right of way of the Western & Atlantic Railroad. Said act is material evidence for the defendant, was offered in evidence by it, and a copy thereof is hereto attached as Exhibit "GG".

73. The court erred in refusing to admit in evidence an Act of the General Assembly of Georgia, approved October 25, 1870 (Georgia Laws 1870 p. 377), granting to the Macon & Western Railroad right of way of the Western & Atlantic Railroad. This act is material evidence for the defendant, was offered in evidence by it, and a copy thereof is hereto attached as Exhibit "HH".

[fol. 691] 74. The court erred in refusing to admit in evidence an Act of the General Assembly of Georgia approved August 23, 1872, Georgia Laws 1872, page 337, granting to the Georgia Western Railroad Company right of way on the right of way of the Western & Atlantic Railroad. Said act is material evidence for the defendant, was offered in evidence by it, and a copy thereof is hereto attached as Exhibit "II".

75. The court erred in refusing to permit defendant to introduce in evidence an Act of the General Assembly of Georgia approved August 26, 1873, Georgia Laws, August 26, 1872, authorizing telegraph companies to construct lines of telegraph upon the rights of way of the several railroad companies of this State, which said act is material evidence, was offered by the defendant, and a copy thereof is hereto attached marked Exhibit "JJ".

76. The court erred in refusing to permit defendant to introduce in evidence a resolution of the General Assembly of Georgia, granting to the Marietta & North Georgia Railroad a right of way upon the right of way of the Western & Atlantic Railroad. Said Act was

material evidence for defendant, was introduced by it, and a copy thereof is hereto attached marked Exhibit "KK".

77. The court erred in refusing to admit in evidence to the jury an Act of the General Assembly of Tennessee (Acts of 1837, Chapter 221, page 319-320), giving to the State of Georgia certain rights in Tennessee subject to certain restrictions. This act is material evidence for the defendant, and a copy thereof is hereto attached as Exhibit "LL".

78. The court erred in refusing to permit defendant to introduce in evidence a Statute of the General Assembly of Tennessee passed February 3, 1848 (Laws of Tennessee 1847-1848, pg. 330) granting [fol. 692] to the State of Georgia certain rights in relation to the Western & Atlantic Railroad. The book containing said acts offered in evidence was published with authority of the State of Tennessee, Said Act is material evidence for defendant, was offered in evidence by it, and a copy thereof is hereto attached as Exhibit "MM".

79. The court erred in refusing to admit in evidence statutes of Tennessee embodied in the Tennessee Code of 1858, published by authority of the State of Tennessee, known therein as Sections 2763, 2764, 2765. Said statutes are material evidence for defendant and the said Code of Tennessee and said statutes therein contained were offered in evidence by defendant, and a copy thereof is hereto attached as Exhibit "NN".

80. The court erred in refusing to admit in evidence an Act of the General Assembly of Tennessee, approved 1895 in the Laws of Tennessee 1895 published by the authority of the State of Tennessee, relative to adverse possession. Said Act is material evidence for defendant, the said laws of Tennessee and said act therein contained were offered by defendant, and copy of said Act is hereto attached as Exhibit "OO".

81. The court erred in refusing to admit in evidence Shannon's code of Tennessee of 1896, published with the authority of the State of Tennessee, and particularly sections 4456, 4457 and 4458 thereof, being a copy of the said Acts and Laws of Tennessee mentioned in the two preceding grounds of this motion, and a compilation thereof without change. Said sections of said code are material evidence for defendant and are offered in evidence by it.

82. The court erred in refusing to admit in evidence a copy of a resolution of the Board of Directors of the Western Union Telegraph Company accepting the provisions of the Act of Congress known as [fol. 693] the Post Roads Act, certified by the Postmaster General of the United States under the seal of the post office and the said certificate which certifies the filing of the same in the postoffice department. Said evidence was material for defendant, was offered by it, and a copy thereof is hereto attached marked Exhibit "PP".

83. The court erred in refusing to admit in evidence copies of the rules of the Railroad Commission of Georgia, promulgated January

7, 1892, and revised in the year 1901, being Rule No. 2 of the commission, attached hereto as Exhibit "QQ". Said evidence is material for defendant, was offered by it, plaintiffs not objecting to the form of the copy but objected on the ground that the same is immaterial and irrelevant.

84. The court erred upon the conclusion of the introduction of evidence by the defendant, in admitting in evidence in rebuttal over defendant's objections then interposed and below stated, a portion of sub paragraph 10 of paragraph 6 of the answer in this cause, which portion was stricken by Judge Pendleton, towit:

"By a contract dated August 18th, 1870, between the Western Union Telegraph Company and the Western & Atlantic Railroad executed in behalf of the Western & Atlantic Railroad by its Superintendent and approved by the Governor of Georgia under the seal of the State, the State of Georgia granted and conveyed to the Western Union Telegraph Company a 'perpetual right of way to erect and maintain telegraph lines along said railroad of as many wires as it may deem necessary to its business, and additional lines of poles whenever' the Western Union Telegraph Company shall so elect."

Counsel for plaintiff in offering the above evidence stated:

"We offer that as an admission by the Western Union Telegraph Company that it claimed under that contract that it had granted and conveyed to it a perpetual right of way along the Western & Atlantic Railroad."

[fol. 694] The defendant then and there objected to said evidence on the ground that it was a mere fragment of an admission, and that if the plaintiff offered the above portion of the answer with respect to the agreement named therein he must also offer the rest of the answer relating thereto as evidence put in by them, which objections the court overruled.

Defendant immediately upon the closing of plaintiffs' testimony in rebuttal claimed the right to read as evidence introduced by the plaintiffs the portion of the answer immediately following the above portion, which had been admitted, towit:

"The preamble of said contract recites that the agreement was entered into 'in order to provide necessary telegraph facilities for the party of the second part (W. & A. R. R.) and to a better understanding of the terms on which the party of the first part (W. U. T. Co.) shall occupy the line of railroad of the party of the second part with the line of lines of telegraph wires belonging to the party of the first part, and to permanently settle and define the business relations between the respective parties hereto.' A copy of said contract is hereto attached as Exhibit 7."

And said Exhibit 7 being a copy of the contract which is attached to this motion as Exhibit "S". The court refused to permit the

defendant to read such portion of its answer and said Exhibit as a part of the evidence introduced by the plaintiff.

Defendant immediately after the ruling last mentioned offered in evidence the original contract between the State of Georgia and the Western Union Telegraph Co. dated August 18, 1870, to which the above evidence introduced by the plaintiffs in rebuttal related, copy of which is hereto attached as Exhibit "S", and the letter from McRae, the Superintendent of the Western & Atlantic Railroad to the Western Union Telegraph Company, copy of which is hereto attached at Exhibit "W" and the receipt of the Western Union Telegraph Company for \$4,000.00 paid it by the Western & Atlantic Railroad [fol. 695] in settlement of the suit of the Western Union Telegraph Company against the Western & Atlantic Railroad, copy of which is hereto attached at Exhibit "Y"; and the certified copy of the record of the last mentioned suit in the U. S. District Court relative to said contract, and the decision of the Supreme Court of the U. S., rendered in said cause, hereto attached as Exhibits "T" and "U", claiming that although the court had ruled out said evidence when originally offered by the defendant on the ground that same was irrelevant and immaterial, yet notwithstanding that ruling it now became relevant and material and defendant should be allowed to introduce the same in evidence because it related to, pertained to, and was in rebuttal of the evidence introduced by the plaintiffs in rebuttal, to-wit, the portion of said paragraph 10 of paragraph 6 of defendant's answer above mentioned. The court nevertheless excluded the said testimony so offered and each portion thereof and would not permit defendant to introduce the same or any part thereof in evidence.

Each of the rulings of the court in this ground mentioned are assigned as error, for which a new trial should be granted.

85. The court permitting, defendant introduced in evidence a letter from the Chief Engineer of the Western & Atlantic Railroad dated October 11, 1850, to Garst & Bean, offering among other things, "To grant you the use of our right of way for the telegraph Company" and the acceptance of that proposition by Garst & Bean, dated October 11, 1850, and the report of the Chief Engineer of the Western & Atlantic Railroad that he had made that contract with Garst & Bean, who proposed to organize a company of stockholders and build for them a telegraph line from Atlanta to Nashville and subsequently made to embrace the Georgia Railroad and to extend to Augusta, to be called the Augusta, Atlanta & Nashville Telegraph Company; which report further stated that the work of constructing a telegraph line had progressed, that all of the posts had been delivered and half or more planted, and wire stretched beyond Kingston. Telegraph offices had been established at Atlanta, Marietta, [fol. 696] Cartersville and Kingston and it was expected that the line would be in working order as far as Chattanooga in a month or two more;

The court permitting, defendant also introduced in evidence the Act of Georgia of January 27, 1852, incorporating the Augusta, At-

lanta & Nashville Magnetic Telegraph Company, which expressly advised and confirmed the contract between said Chief Engineer and Garst & Bean and further expressly provided "that the Augusta, Atlanta & Nashville Magnetic Telegraph Company shall have power and authority to set up their fixtures along or across any high road or high roads; or any railroad which may now or hereafter belong to this State.

After the introduction of the above evidence, and before defendant ceased offering evidence in chief, defendant offered in evidence the originals or copies of its muniments of title, copies of which are hereto attached as Exhibits B, C, D, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, W, X, which the court had excluded, notwithstanding movant's claim that the several copies had been sufficiently proved, and were the best and highest evidence thereof. The defendant moved that all of said evidence previously excluded which constituted the several links in defendant's chain of title, be admitted on the ground that same was material and that the evidence showed the connection of each link with each other link in defendant's chain of title. This motion the court overruled, and in so doing committed error.

86. Prior to the charge of the court to the jury, defendant presented the following written motion to the court, to wit:

[fol. 697]

FULTON SUPERIOR COURT

STATE OF GEORGIA and NASHVILLE, CHATTANOOGA & ST. LOUIS  
RAILWAY

vs.

WESTERN UNION TELEGRAPH CO.

Now comes the defendant in the above cause, on this the 3rd day of June, 1922, and prior to the charge of the Court to the jury, which will not be made prior to June 5, 1922, (the jury having been instructed, upon the conclusion of argument for both parties on June 2nd, 1922, that they need not appear until June 5, 1922, on which date the Court will deliver its charge to the jury) and shows to the Court that each of the following items of evidence were offered in evidence by the defendant, after the plaintiff had rested in the introduction of its evidence and before defendant announced that it rested, each of which items of evidence were read to the jury and were, on motion of plaintiffs' counsel, ruled out, with the instruction from the Court that the same should not be considered by the jury, to wit:

(1) A certified copy of an indenture from the Augusta, Atlanta & Nashville Magnetic Telegraph Co. to Wm. Pylus and Samuel M. Scott, dated January 29, 1855, recorded in the office of the Clerk of the Superior Court of Richmond County, Georgia, February 22nd 1855.



(2) A certified copy of an indenture from the Augusta, Atlanta & Nashville Magnetic Telegraph Co. to J. Washburn, dated January 29, 1855, recorded in the office of the Clerk of the Superior Court of Richmond County, Georgia, February 22nd, 1855.

(3) A certified copy of an indenture from the Augusta, Atlanta & Nashville Magnetic Telegraph Co. to Samuel Clark, dated March [fol. 698] 18, 1855, recorded in the office of the Clerk of the Superior Court of Richmond County, Georgia, May 1st, 1855.

(4) A certified copy of an indenture from Robert Wiggins, Sheriff, to A. D. Hammett, dated January 7, 1859, recorded in the office of the Clerk of the Superior Court of Richmond County, Georgia, March 23, 1867.

(5) A verified copy of a notice given by G. A. Parker, Deputy Sheriff, published in the Augusta Chronicle, advertising the sale of a portion of the Augusta, Atlanta & Nashville Telegraph Line, levied on as the property of the Augusta, Atlanta & Nashville Telegraph Line, to satisfy an execution issued from Cobb Superior Court, September Term, 1857, in favor of Camp & Hammett vs. Augusta, Atlanta & Nashville Telegraph Line.

(6) Certified copy of an indenture from John Y. Flowers, Sheriff, of Dekalb County, to A. D. Hammett, dated January 4, 1859, recorded in the office of the Clerk of the Superior Court of Dekalb County, March 14, 1867, reciting that the indenture is made pursuant to an execution issued in Cobb Superior Court against the Augusta, Atlanta & Nashville Telegraph Company, and selling property therein described as the property of, and levied upon as the property of, said Augusta, Atlanta & Nashville Magnetic Telegraph Company.

(7) The record in Fulton Superior Court in the case of Enoch R. Mills, for the use of Jos. G. W. Mills vs. the Augusta, Atlanta & Nashville Magnetic Telegraph Co., upon which a process was issued December 26, 1853, reciting, among other things, that petitioner had been appointed General Agent for the Augusta, Atlanta & Nashville Magnetic Telegraph Line; that petitioner had been also the President of said Augusta, Atlanta & Nashville Magnetic Telegraph Company; and that, for work, services and money expended by petitioner in behalf of the Augusta, Atlanta & Nashville Magnetic Telegraph Company, the last named corporation [fol. 699] was indebted to petitioner in a certain sum of money therein named; the return of the Sheriff therein, certifying that he had served the Augusta, Atlanta & Nashville Magnetic Telegraph Company, by leaving a copy of the petition and process with its agent and at its office in the City of Atlanta, December 29th, 1853; and in which cause is a plea signed by L. E. Bleckley, attorney for the Augusta, Atlanta & Nashville Telegraph Company reciting that "Wm. L. Mitchell was, at the commencement of said suit, and still is, the President and Chief Officer of the Augusta, Atlanta & Nashville Magnetic Telegraph Company." duly sworn to by the said Wm.



L. Mitchell; and in which suit a judgment was rendered in favor of the plaintiff against "The Augusta, Atlanta & Nashville Magnetic Telegraph Company, in the sum of \$1,652.36, as the principal debt, and the further sum of \$375.90, as interest on said principal debt," and costs of court, dated April 28th, 1858.

The defendant now respectfully moves that each and every item of testimony heretofore offered by it and above enumerated, be submitted to the jury as evidence pertinent, competent and admissible under the issues raised in this cause, and upon each of the following grounds:

That the said documentary evidence and each item thereof tends to support and prove, and is a circumstance proving or tending to prove

(a) That the Augusta, Atlanta & Nashville Magnetic Telegraph Co. accepted the charter granted to it by the State of Georgia, which has been introduced in evidence in this cause.

(b) That the Augusta, Atlanta & Nashville Magnetic Telegraph Co. did construct and operate a telegraph line, pursuant to and under the provisions of its said charter, and particularly upon and along the Western & Atlantic Railroad, from Atlanta, Georgia, to Chattanooga, Tennessee, where the present line of the Western Union Telegraph Company involved in this suit is now located.

[fol. 700] (c) The above mentioned record from this Honorable Court proves or tends to prove the fulfillment of that provision of the contract with Garst & Bean, to the effect that the Chief Engineer of the Western & Atlantic Railroad, W. L. Mitchell, represent the State of Georgia in the meetings of the Augusta, Atlanta & Nashville Telegraph Company.

It is particularly important that this evidence be submitted to the jury, under a proper charge of this Honorable Court, because otherwise defendant will be deprived of the submission to the jury of evidence supporting its claims, and which it is entitled to have submitted to the jury; and in view of the importance of this case, and in view of the length of time consumed in the trial thereof, it is right and proper that this motion be now submitted by defendant, and is submitted by it not only as a means of securing rights to which defendant believes it to be entitled, but to avoid the rendition of any verdict which would be invalid because of the rejection of such evidence, if defendant's claims, as hereinabove set forth, are well founded.

The court overruled said motion, and in so doing committed an error, for which a new trial should be granted.

87. The plaintiff having announced that it requested the court to require a special verdict of the facts in the case and to inform the jury what issues of fact are made by the pleadings in the case, the defendant, after the case had been called for trial and before the beginning of the introduction of evidence therein, submitted to the court the following written statement of issues of fact to be sub-

mitted to the jury and as to which a special verdict should be found, to-wit:

[fol. 701]

IN FULTON SUPERIOR COURT

STATE OF GEORGIA et al.

vs.

WESTERN UNION TELEGRAPH CO.

Now comes defendant in the above cause, after the same is called for trial, and before the beginning of introduction of evidence therein, and, plaintiff having requested the Court to require a special verdict of the facts in said cause, and to inform the jury what issues of fact are made by the pleadings in the case, defendant submits that among the issues of fact to be submitted to the jury, and as to which a special verdict should be found, are the following:

1. What are the rights of way or rights in land between Atlanta, Georgia, and Chattanooga, Tennessee, which belong to the State of Georgia, as a part of the properties known as The Western & Atlantic Railroad and used in connection with the maintenance and operation thereof?

2. By what conveyances or other means has the State of Georgia acquired title to land, or to an easement in, through, over or on land, for the maintenance of the Western & Atlanta Railroad, and the operation of its trains?

3. What part of the right of way of the Western & Atlantic Railroad has been acquired by the State of Georgia by purchase or gift and by deed or conveyance from owners of the land through which said right of way is situated?

4. What part of the right of way of the Western & Atlantic Railroad has been acquired from the owners of land by adverse possession and by prescriptive title, and not by purchase or gift and conveyance or deed, from the land owner?

5. What part of the right of way of the Western & Atlantic Railroad is occupied by the Railroad and claimed by the State of Georgia by prescriptive title, and by continued adverse possession?

[fol. 702] 6. Has the State of Georgia title to the land upon, over and through which the Western & Atlantic Railroad is maintained and operated; or has the State of Georgia only an easement in that land sufficient for the operation of the Western & Atlantic Railroad, all other and surplus uses of said land and the title to said land itself being in third persons?

7. Does the State of Georgia own the Western & Atlantic Railroad and the properties and rights of way appurtenant thereto, or used in connection therewith, in its sovereign or governmental capacity, or as an ordinary railroad corporation, or private person?

8. Has the Western & Atlantic Railroad ever been incorporated? If it has not been incorporated, has it been owned, operated and used in the same manner as a railroad of an incorporated railroad company?

9. Has the State of Georgia authorized the issue of stock for or in connection with the Western & Atlantic Railroad, or as an aid to its construction, maintenance and operation?

10. How much of such stock has been issued?

11. Has the Western & Atlantic Railroad, its operation and properties, other than its net revenues, ever been devoted to, or is it now devoted to, any uses other than the uses to which like properties of railroad corporations incorporated by, or operating in, the State of Georgia are devoted; and if there have been or are any other uses to which the same have been devoted, what are they?

12. Has the Western & Atlantic Railroad been used and operated by the State of Georgia or by its lessees, or any of them, for any purpose or use other than the transportation of freight and passengers, upon the payment by the public of freight and passenger fares, in like manner as railroad properties of railroad corporations are operated in the State of Georgia for the transportation of freight and passengers upon the payment by the public of freight and passenger [fol. 703] fares? If the Western & Atlantic Railroad has been operated by the State of Georgia or any of its lessees for any other use or purpose, what are such other uses or purposes for which it has been used?

13. Is the land upon which the Western & Atlantic Railroad and its trains are operated exclusively owned by the State of Georgia? Or is that land and all use of that land not interfering with the use thereof by the State of Georgia in the maintenance and operation of the Western & Atlantic Railroad and its railroad purposes owned by some one other than the State of Georgia?

14. Does the Western Union Telegraph Company own and possess an easement for the maintenance, construction, reconstruction and operation of its line of telegraph in, on, over and through the land on which the State of Georgia has an easement for the operation of the Western & Atlantic Railroad?

15. Was the contract alleged in Exhibit 1 of defendant's answer, as amended, made and entered into by Garst & Bean and W. L. Mitchell, Chief Engineer of the Western & Atlantic Railroad?

16. Was the contract alleged in Exhibit 1 of defendant's answer, as amended, between Garst & Bean and W. L. Mitchell, Chief Engineer of the Western & Atlantic Railroad, ratified and approved by the Legislature of Georgia, by an act entitled "An Act to incorporate the Augusta, Atlanta & Nashville Magnetic Telegraph Company" approved January 27, 1852?

17. Was a telegraph line constructed along the Western & Atlantic Railroad under the contract between Garst & Bean and W. L. Mitchell, Chief Engineer of the Western & Atlantic Railroad, alleged in Exhibit 1 of defendant's answer, as amended?

18. Did the Augusta, Atlanta & Nashville Magnetic Telegraph Company become the owner of a line of telegraph constructed under [fol. 704] the agreement alleged in Exhibit 1 of defendant's answer?

19. Did the Augusta, Atlanta & Nashville Magnetic Telegraph Company construct, maintain or operate a line of telegraph along the Western & Atlantic Railroad, and did it acquire perpetual easements in the land therefor?

20. Is there any evidence that any telegraph line constructed or operated by Garst & Bean or by the Augusta, Atlanta & Nashville Magnetic Telegraph Company along the Western & Atlantic Railroad, was at any time abandoned?

21. Have lines of telegraph constructed, operated or owned by the Augusta, Atlanta & Nashville Magnetic Telegraph Company, and the easement in the land used and possessed in connection therewith, and the title thereto, passed by successive conveyances and grants from the Augusta, Atlanta & Nashville Magnetic Telegraph Company, its successors and assigns, into the possession of the Western Union Telegraph Company?

22. How long has the line of telegraph now operated by the Western Union Telegraph Company along the Western & Atlantic Railroad, and to which this suit relates, existed, when was that line of telegraph first constructed, and for how many years has that line of telegraph been maintained and operated?

23. When did the Western Union Telegraph Company first come into possession of the line of telegraph now operated and maintained by it along the Western & Atlantic Railroad, and the easements and rights in land now enjoyed and used by the Western Union Telegraph Company therefor?

24. Has the possession by the Western Union Telegraph Company of the line of telegraph now operated by it, and to which this suit relates, and the easements in land necessary therefor, been continuous from its first possession thereof, to the present time?

25. Did the Western Union Telegraph Company acquire from the American Telegraph Company the line of telegraph and easements in land necessary therefor, now maintained and operated by the [fol. 705] Western Union Telegraph Company, and involved in this suit, and did not the Western Union Telegraph Company acquire the same under an indenture or agreement between itself and the American Telegraph Company, dated June 12, 1866?

26. Did the American Telegraph Company acquire the telegraph and easements in land necessary therefor, involved in this suit, from

Wm. S. Morris and others, by deed or conveyance from them dated December 28, 1859?

27. Did the Confederate Telegraph Company or a telegraph company or organization with Wm. S. Morris, as President, during the Civil War and during the years 1860 to 1865 possess, maintain and operate the line of telegraph and easements necessary therefor, involved in this suit, and deliver and return possession thereof to the American Telegraph Company in the year 1865?

28. Did Wm. S. Morris and others acquire the telegraph line and easements in land necessary therefor involved in this suit, situate in Georgia, from A. D. Hammett, by deed or conveyance dated September 1, 1858?

29. Did Wm. S. Morris and others acquire the line of telegraph and the easements in land necessary therefor, involved in this suit, situate in Tennessee, from George L. Willy, by deed dated November 13, 1858?

30. Is not the line of telegraph described and referred to in conveyances by A. D. Hammett and by George L. Willy to W. S. Morris and others, dated, respectively, September 1, 1858, and November 13, 1858, the line of telegraph previously owned and operated by the Augusta, Atlanta & Nashville Magnetic Telegraph Company?

31. Has the Western Union Telegraph Company acquired, by prescriptive title and adverse possession, easements in land necessary for the maintenance and operation of its line of telegraph, involved in this suit, against the owners of the land, in, through and over which the State of Georgia has an easement or right of way for the [fol. 706] maintenance and operation of the Western & Atlantic Railroad?

32. Did the predecessors of the Western Union Telegraph Company, or any of them in the possession and operation of the line of telegraph involved in this suit, acquire, by prescriptive title and adverse possession, easements, in the land necessary for the maintenance and operation of the line of telegraph involved in this suit, against the owners of the land, in, through and over which the State of Georgia has an easement and right of way for the maintenance and operation of the Western & Atlantic Railroad?

33. Did the State of Georgia ever convey, give or grant to any person or persons or corporation or corporations easements in land necessary for a line of telegraph situate along the Western & Atlantic Railroad, where the line of telegraph involved in this suit is situated?

34. Did the Western Union Telegraph Company, of the one part, and Foster Blodgett, as Superintendent of the Western & Atlantic Railroad, of the other part, enter into a contract, dated August 18, 1870, which states that a perpetual easement or right of way is thereby given and granted to the Western Union Telegraph Com-

pany to erect and maintain telegraph lines along the Western & Atlantic Railroad, and was that contract approved by Rufus B. Bullock, as Governor of the State of Georgia, and was the seal of the Executive Department of the State of Georgia affixed thereto and attested; and was that agreement, so executed, approved and sealed, delivered to Western Union Telegraph Company; and is the line of telegraph now maintained and operated by the Western Union Telegraph Company, along the Western & Atlantic Railroad, the line of telegraph then and ever since in existence, and then and ever since maintained and operated by the Western Union Telegraph Company?

35. Has this suit been instituted by the State of Georgia, on its own initiative, or at the instigation or upon the suggestion or request of the Nashville, Chattanooga & St. Louis Railway?

[fol. 707] The court failed and refused to submit to the jury the issues which the defendant so submitted should be submitted to them, and upon which a special verdict should be found; an error is assigned upon the refusal of the court to submit each of the special issues so named by defendant with the same force and effect as if the refusal to submit each separate issue separately numbered as above were made a separate ground of this motion; this method being adopted in the interest of brevity.

88. The court erred in refusing to give to the jury trying the case each of the following pertinent legal charges below designated (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), duly requested and submitted in writing signed by defendant's counsel before beginning of the charge, to-wit:

[fol. 708] (a) The burden of proof is upon the plaintiffs, and it is incumbent on the plaintiffs to prove the allegations contained in the petition in this cause.

(b) The best evidence which exists of a fact alleged, in the petition and sought to be proved by the plaintiffs, must be produced unless its absence is satisfactorily accounted for.

(c) Where a party has evidence in his power and within his reach by which he may repel a claim or charge against him and omits to produce it, or having more certain and satisfactory evidence in his power, relies on that which is of a weaker and inferior nature, a presumption arises that the charge or claim is well founded.

(d) Written evidence of title, written deeds under which title to land is claimed, is the highest and best evidence of title and should be produced. Deeds to land or to easements or interest in land constitutes generally the highest evidence of title and of the character of interest in land conveyed thereby, and where it is proven that a party claiming title to land claims under such deeds, it is incumbent on that party to produce those deeds or to show his inability to produce them and the facts which make it impossible for him to produce them in evidence.

(e) The Government or State, in the trial of this case, is subject to the same rules respecting the burden of proof, the kind and character of evidence, the presumptions of law and fact, that attend the prosecution of a like action by an individual, and the same rules respecting the burden of proof, the kind and character of evidence, the presumptions of law and fact, apply equally in this case to both the plaintiffs and to the defendant.

(f) The plaintiffs in this cause claiming that the State of Georgia is the owner of the Western & Atlantic Railroad, together with its rights of way and properties, it is incumbent on the plaintiffs to prove what the Western & Atlantic Railroad is, what its properties are, what its rights of way are, and whether its rights of way and interest in land is the land itself and all and every use thereof, or only an easement or right of way in, over and through land for railroad purposes.

(g) The plaintiffs must recover on the strength of their own title. If the plaintiffs fail to prove title in themselves, they cannot recover.

(h) If it be proved that there is an outstanding title to the easements necessary for the construction, maintenance and operation of defendant's lines of telegraph where situate along the Western & Atlantic Railroad, superior to that of the plaintiffs, the plaintiffs cannot recover, even though it be not proved that the defendant has title to such easements. If it be proved that there is an outstanding title in the Augusta, Atlanta & Nashville Magnetic Telegraph Company superior to that of the plaintiffs, the plaintiffs cannot recover, even though defendant may not connect itself with the [fol. 710] title in the Augusta, Atlanta & Nashville Magnetic Telegraph Company, and even though the defendant does not show, by deeds or other muniments of title, transmission of that title into itself.

(i) The defendant in this cause may defeat a recovery by the plaintiffs by showing a paramount outstanding title in the easements claimed by the plaintiffs in a third person, and to defeat recovery by the plaintiffs, it is not at all necessary that the defendant should introduce evidence connecting his possession with that title.

(j) If the defendant proves possession in itself, that is a protection against all who seek to disturb that possession by the defendant until the true owner proves his superior title thereto, and if the defendant proves that it is in possession of telegraph lines along the Western & Atlantic Railroad and the easements necessary therefor, it cannot be disturbed in that possession by the plaintiffs until and unless plaintiffs prove title in themselves.

(k) A complaint for land cannot be maintained where proof shows title out of the plaintiff. If the evidence in this cause shows that the State of Georgia gave title to easements for telegraph



lines along the Western & Atlantic Railroad necessary for the construction, maintenance and operation of a line of telegraph located where the line of telegraph of the Western Union along the Western & Atlantic Railroad is now located, the plaintiffs cannot recover unless the plaintiffs show, by competent evidence, that in some manner provided by law, title to such easements have been subsequently acquired by them or by one of them.

[fol. 711] (l) If the evidence proves that the State of Georgia parted with title to easements to telegraph lines situate where the Western Union Telegraph lines are now located along the Western & Atlantic Railroad, the law presumes that such title continues out of the State of Georgia until, by competent proof, it is established that title to such easements has been subsequently, in some lawful way, acquired by the State of Georgia.

(m) An easement created by a deed or by a legislative grant, is not forfeited by mere non-user or abandonment, and when the non-user or abandonment has not continued for a term sufficient to raise the presumption of release or abandonment. Abandonment must be evidenced by some decisive and unequivocal act before a forfeiture thereof can exist.

(n) If you find that the State of Georgia granted a perpetual easement for the construction, maintenance and operation of a line of telegraph upon or along the Western & Atlantic Railroad, from Atlanta to Chattanooga, where the line of telegraph of the Western Union Telegraph Company along that railroad is now situate, and if you find that the Western Union Telegraph Company is now, and has been, enjoying and using those easements, and has been and is in possession thereof, and of lines of telegraph for the construction, maintenance and operation of which such easements are necessary, and if you find that there is a gap in the chain of title between the title granted to the Augusta, Atlanta & Nashville Magnetic Telegraph Company for those easements, if you find that there was such a grant, and the title to, or possession of, the same by the Western Union Telegraph Company, then I charge you that [fol. 712] you must take into consideration presumptions which the law, under certain circumstances, recognizes. The presumption which you are authorized to make of a lost deed or deeds, is not necessarily restricted to what may fairly be supposed to have occurred, but rather to what may have occurred and seems requisite to quiet title in the present possession of those easements. Many circumstances may prevent the execution of a deed of conveyance and to which the occupant of land is entitled, or may lead to the loss of such deed or deeds after they have been executed. The rule of presumption in such cases is one of policy as well as of convenience and necessary for the peace and security of society. Where one uses an easement and whenever he see fit, and has had adverse and uninterrupted enjoyment thereof for twenty years or more, such enjoyment, without evidence to explain how it began, is presumed to have been in pursuance of a grant or deed. It is not necessary

in such cases for the jury, in order to presume a conveyance, to believe that a conveyance was, in point of fact, executed. It is sufficient if the evidence leads to the conclusion that the conveyance or conveyances might have been executed, and that the existence thereof would be a solution of the difficulties arising from non-execution thereof.

(o) A grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years, and such rule will be applied as a presumption of law and of right whenever, by possibility, a right may be acquired in any manner known to the law. Though lapse of time does not of itself furnish a conclusive bar to the title of the sovereign agreeable to the maxim that no time runs against the state, yet if the adverse claim could have a legal commencement, and if you find that the possession and adverse claim of the Western Union Telegraph Company in this case could have had a legal commencement, then the presumption upon which you are authorized to act is that the commencement of such possession by the Western Union Telegraph Company, after many years of interrupted possession or enjoyment, if you find that to be the case, originated and commenced lawfully and under a lawful grant or deed.

(p) A railroad right of way may consist of land and of use thereof owned by the owner of the railroad, or it may consist of a mere easement or right to operate a railroad over land. The language "right of way" implies an easement or right of passage over land, and does not imply ownership of the land itself. Where the owner of a railroad owns a mere railroad right of way in land or an easement in land for railroad purposes, the ownership of the land itself is in a third person, and the right of way or easement possessed by the owner of the railroad is limited to an occupation and use reasonably demanded for the transaction of the business of the railroad, the ownership of the land itself and every other use of an easement in the land remaining in the person who granted the railroad right of way or easement to the owner of the railroad.

(q) The plaintiffs in this case claim that the defendant, in a condemnation proceeding against the Western & Atlantic Railroad, instituted several years ago, and in equity causes in this Court, brought by the Western & Atlantic Railroad Company and by the State of Georgia to prevent such condemnation, made admissions that the State of Georgia is the owner of the Western & Atlantic Railroad right of way. I charge you that if you find the plaintiffs did make admissions of that character, they are not estopped thereby [fol. 714] from now denying in this case that the State of Georgia has title to the easements upon and along that right of way now claimed by the Western Union Telegraph Company, and they are not estopped thereby from requiring the State of Georgia to prove that it is in fact the present owner of such easements and rights in land for said telegraph lines now claimed to be owned by the Western Union Telegraph Company.

(r) Under the law, the taking of a deed from a third person does not necessarily affect any title then or previously possessed by the person taking such deed.

(s) A rule of law applicable in this case is that so long as the plaintiffs are not injured by it, the defendant, even if you should find that it admitted any ownership in the State, may retract such admission, and may retract any disclaimer of title made by it and assert its title against the plaintiffs in this cause, and may require the plaintiffs in this cause to prove title in themselves.

(t) A rule of law applicable in this case is that if a party impliedly admits title to be in another, he may, notwithstanding, show that he had the title, and if he does satisfactorily, his title will be protected against such admissions made by him.

(u) Another rule of law applicable in this case is that a party is not concluded by admissions against his title, but may explain or avoid them, by evidence, unless his adversary has acted upon them, and has been induced by such admissions to alter his condition for the worse.

[fol. 715] (v) I charge you that the act of the Georgia Legislature of Jan. 27, 1852, incorporating the Augusta, Atlanta and Nashville Railroad Company did, ratify and confirm the contract between W. L. Mitchell Chief Engineer and Garst and Bean specified in Sec. VI of that act.

Error is assigned upon the refusal of the court to give in charge each pertinent legal charge above specified designated (a), (b), (c), (d), (e), (f), (g), (h), (i), (j), (k), (l), (m), (n), (o), (p), (q), (r), (s), (t), (u), (v), with the same force and effect as if the refusal to give each said pertinent legal charge so requested were made a separate ground of this motion; the method here adopted being in the interest of brevity.

89. The court erred in charging the jury trying this case "all stricken portions of the pleadings, which includes exhibits that have been stricken, of course, are ruled out and should not be considered by the jury."

The foregoing charge is erroneous in that it excludes from the consideration of the jury portions of the pleadings qualifying and explaining other portions of the pleadings which had been introduced in evidence by the plaintiffs as admissions against the defendant, and particularly those referred to in grounds 19 and 20 of this motion.

90. The court erred in charging the jury trying the case:

"Prescriptions do not run against the State."

And again:

"Now, I have stated to you about this law of prescription; that possession of land constituting a part of the right-of-way of the Western & Atlantic Railroad, no matter how long it continued, or what good faith or claim of right it gave, would never ripen into a title against the State; the law of prescription would not apply to the State."

Said charge is erroneous in that:

- (a) It does not state the law.
- (b) It does not state the law of Georgia as to prescriptive title to land or easements in Georgia.
- (c) It does not state the law of Tennessee as to prescriptive title to land or easements in Tennessee.
- [fol. 716] (d) It does not state the law in respect to land, easements, or interest in land of the Western & Atlantic Railroad.

91. The court erred in charging the jury trying the case:

"Then, there is another way in which the defense claims they might acquire title, acquire a right by silence. For instance, if you saw another man sell your horse, you saw him represent to a purchaser that it was his horse, you saw the purchaser pay for it and stood by and said nothin, the horse would be gone as far as you were concerned. You would be estopped from denying it was your horse because the time for you to assert your title to the horse was when you saw it being sold. That sort of doctrine does not apply to the State either. The mere fact that the State knew about somebody occupying some of the land, that it had a right to claim, and that it did not assert its claim to it would not estop the State from asserting its title. Whenever the State got ready to exercise its right it would have the right to do so. This doctrine came down to us from ancient days and used to be known in the law as *nullus tempus occurrit regi* that is, time would not run against the king. We have no king but we have our government and our immediate government is the State and the State ought to have and does have some privileges that an individual could not have.

"That is what the State comes in here and sets up; it says it had the right of way to a railroad, that it built a railroad, that it took charge of a railroad—built it on its right of way and says that it has a right to have people that have no right on it to get off, and that it has notified this claimant, the Western Union Telegraph Company, to get off of its right of way."

The foregoing charge is erroneous in that

- (a) It does not state the law.
- [fol. 717] (b) It does not state the law of Georgia as to estoppel with respect to title to land, interest in land, or easements in Georgia.

(c) It does not state the law of Tennessee as to estoppel with respect to title to land, interest in land or easements in Tennessee.

(d) It does not state the law in respect to land easements, or interest in land of the Western & Atlantic Railroad.

(e) It does not state the law of Georgia as to prescriptive title.

(f) It does not state the law of Georgia as to prescriptive title to land, interest or easements in land of the Western & Atlantic Railroad.

(g) It does not state the law of Tennessee as to prescriptive title to land, interest or easement in land of the Western & Atlantic Railroad.

92. The court erred in charging the jury trying this case:

"There is another rule that governs a case like this—that no officer of the State would have the right to bind it in a case in which he was not directly authorized to act. That is to say, suppose the Western & Atlantic Railroad was run by the state—the president of it, if the State chose to appoint a president or superintendent, would not have the right to dispose of any of the property, or any rights or privileges of it, unless he had the authority of the State to do it. Those things must be done in regular order and in a legal way. If every man in the legislature—in the House and Senate—were to sign a bill declaring a thing to be the law, that would not have the effect of law unless it was done up here at the Capitol in regular session, and the Governor of Georgia would not have the right to dispose of any of the State's property unless he was authorized by law to do it. [fol. 718] Hence, if you should believe that any officer of the State disposed of the property of the State without authority of law, you would disregard his disposition of it, it would not bind the State.

"The State, however, in its wisdom, by legislative enactment could ratify or confirm something that was done even without authority; the State could by proper legislative enactment ratify it, but it would have to be a distinct ratification."

The said charge is erroneous in that:

(a) It does not state the law of Georgia.

(b) It does not state the law of Tennessee.

(c) It does not state the law of Georgia with respect to the Western & Atlantic Railroad and officers of the Western & Atlantic Railroad.

(d) It does not state the law of Tennessee with respect to the Western & Atlantic Railroad and its officers.

(e) That portion of the charge complained of reading:

"The State, however, in its wisdom, by legislative enactment could ratify or confirm something that was done even without authority;

the State could by proper legislative enactment ratify it, but it would have to be a distinct ratification,"

Is erroneous in that the court thereby left it to the jury to determine the effect of the act incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company, and particularly those parts thereof quoted in ground 20 of this motion, and particularly Sec. 6 of that act reading "That the contract entered into on the 11th day of October 1850 by William L. Mitchell Chief Engineer of the Western & Atlantic Railroad, and D. W. Gaust and J. M. Bean, should on the part of said Company, be, and the same is hereby ratified and confirmed." The contract referred to in Par. 6 of said act is fully set forth as Exhibit 1 to the first amendment to defendant's answer, and [fol. 719] is referred to in Par. XVI thereof. That contract consists of a letter from said W. L. Mitchell Chief Engineer dated October 11, 1850 to David W. Garst and James M. Bean, in which W. L. Mitchell Chief Engineer stated that after "full and free conversations with his Excellency, Geo. W. Towns, upon the subject—we have come to the conclusion to submit to you this proposition—(2) to grant you the use of our right of way for the Telegraph Company." No limit was put upon the grant. On October 11, 1850 D. W. Garst and J. M. Bean wrote a letter to W. L. Mitchell Esq., Chief Engineer stating "We hereby accept the proposition submitted in yours of this date." Those letters constituted the contract referred to in Sec. 6 of said act.

Said charge is also erroneous in that it left to the jury to determine without appropriate instructions the effect of the resolutions of the Legislature of Georgia referred to in grounds 64, 65 and 66 of this motion, and of which copies are hereto attached as Exhibits U, AA, BB.

93. The court erred in charging the jury trying this case:

"Now, the burden is on the defendant, when it comes in and says I am there and there rightfully; then the burden is on the defendant to show how it is there, and how it is there rightfully."

The charge complained of is erroneous in that the effect of this charge is to remove the burden of proof from the plaintiffs and to place it on the defendant. The plaintiffs having alleged that defendant is without title and is wrongfully and without authority from the State of Georgia occupying land and easements in land of the Western & Atlantic Railroad, which charge the defendant denied, and in denying the same alleged that it was rightfully, lawfully and with good title in possession of such land and easements.

94. The court erred in charging the jury trying this case as follows:

"You gentlemen are to determine, of course, in this case whether the State of Georgia owns this railroad or not, and you are to determine if it has a right of way and if so you are to determine what the right of way is. The burden of proof is on the State to show it.



That don't mean that it is necessarily the duty of the Western & Atlantic Railroad to produce written title to every foot of its right of way, or exact measurements and all that. You are to look to all the evidence in this case and say whether the State of Georgia has that railroad, and then you are to look to all the evidence in the case, both that which is positive and that which is direct and indirect, or circumstantial, and that which is documentary and then what they claim as admissions and then say did it have a right of way and if so then determine whether this defendant is on it, and if so whether it is then on it by right or without right."

This charge is erroneous in that

(a) That court uses the word "right-of-way" and tells the jury it is to determine what the right-of-way is, but does not in any way instruct the jury, or give it any rules by which it can determine, what the right-of-way may be, or what limitations there may be to the right-of-way, or whether the "right-of-way" may be limited to the use of the land for railroad purposes only, title to the land and all other use and easement remaining in the original land owner, or whether ownership of right of way in land by the State of Georgia [fol. 721] for the Western & Atlantic Railroad is or is not necessarily exclusive of ownership of easements in that land for a line of telegraph, and particularly the line of telegraph of the Western Union Telegraph Company.

(b) That portion of the charge complained of reading:

"You are to determine if it (State of Georgia) has a right of way \* \* \*. The burden of proof is on the State to show it. That don't mean that it is necessarily the duty of the Western & Atlantic Railroad to produce written title to every foot of its right of way or its exact measurements and all that. You are to look to all the evidence in this case and say whether the State of Georgia has that Railroad \* \* \* and then say did it have a right of way, and if so, then determine whether this defendant is on it,"

is erroneous in that it relieves the plaintiffs of the burden of proving title which the law imposes on them. The court states "that don't mean that it is necessarily the duty of the Western & Atlantic Railroad to produce written title to every foot of its right of way or exact measurements and all that." This is erroneous in not instructing the jury what proof to title, if any, will take the place of written title, and does not require proof of title to all of the right of way claimed in the petition. Furthermore, the court in the charge complained of tells the jury to consider admissions of defendant in determining proof of ownership of right of way by the plaintiffs, and thereby permits weak and secondary evidence of facts not pleaded to supply any absence of proof of the allegations of the petition imposed upon plaintiffs by the law of Georgia.

95. The court erred in charging the jury trying the case:

"So you are to look to all this evidence and determine under all the evidence in the case whether this road belongs to the State; [fol. 722] whether this road has got a right of way; then whether



this Western Union Telegraph Company is on it and whether they are on it by consent of the State or by an- contract that they State might make through itself or properly constituted agents, that is for you to determine."

This charge is erroneous in that the court uses the word "right-of-way" and tells the jury it is to determine whether the Western & Atlantic Railroad has a "right-of-way", but does not in any way instruct the jury, or give it any rules by which it can determine, what the "right-of-way" may be, or what limitations there may be to the "right-of-way," or whether the "right-of-way" may be limited to the use of the land for railroad purposes only, title to the land and all other use and easement remaining in the original land owner, or whether the "right-of-way" in land by the State of Georgia for the Western & Atlantic Railroad is or is not necessarily exclusive of ownership of easements in that land for a line of telegraph, and particularly the line of telegraph of the Western Union Telegraph Company.

96. The court erred in charging the jury that he submitted a special issue in this case as follows:

"Question No. 1, Is the State of Georgia the sole and exclusive owner of the right of way of the Western & Atlantic Railroad extending from the city of Atlanta, in the State of Georgia, to the city of Chattanooga, in the State of Tennessee, in its sovereign or governmental capacity?" I will submit this paper to you and there is a blank space there in which you may write your answer, and your answer will be that it is, or that it is not. And, if you do not believe that the State of Georgia owns it in its sovereign capacity you will say that, but under the evidence in this case the Court is of the opinion that you cannot find anything else but to answer in the affirmative, that question. That is to say that the State of Georgia does own its right of way. But, if you believe under the evidence, that there is some part of it that the State [fol. 723] don't own, it would be your duty to so state?"

This charge is erroneous in that

(a) The court uses the word "right-of-way" and tells the jury that the State of Georgia owns, and is the exclusive owner of, the "right-of-way" for the Western & Atlantic Railroad and to so find, but does not in any way instruct the jury, or give it any rules by which it can determine, what the "right-of-way" may be, or what limitations there may be to the "right-of-way", or whether the "right-of-way" is limited to the use of the land for railroad purposes only, title to the land and all other use and easement remaining in the original land owner, or whether ownership of "right-of-way" in land by the State of Georgia for the Western & Atlantic Railroad is or is not necessarily exclusive of ownership of easements in that land for a line of telegraph, and particularly the line of telegraph of the Western Union Telegraph Company.

(b) There is error in the following portion of said charge:

"Under the evidence in this case the court is of the opinion that you cannot find anything else but to answer in the affirmative, that question. That is to say that the State of Georgia does not own its right of way."

This charge is erroneous in that it incorrectly states the law and furthermore is contrary to the evidence which shows that the State of Georgia did not own the right of way of the Western & Atlantic in its sovereign capacity.

It is further erroneous in stating that the State of Georgia does own its right of way, thereby infringing upon the province of the jury and expressing an opinion on the evidence.

Moreover, this statement by the court is erroneous because the evidence does not prove title in the State of Georgia of said right of way, or the dimensions or location of that right of way; does not prove the easements in land occupied and enjoyed by the Western Union Telegraph Company were a part of the easements or right of [fol. 724] way which the State may have possessed in land for a limited purpose—that is for railroad purposes—does not show that these two easements, one for telegraph purposes, the other for railroad purposes, were not in fact separate and distinct easements and separately possessed by different owners even though concurrently existing on, over in and through the same land.

97. The court erred in charging the jury trying the case that he submit a special issue in this case as follows:

"Question No. 2. Is the Nashville, Chattanooga & St. Louis Railway the lessee from the State of Georgia of said Western & Atlantic Railroad and its right of way, operating said railroad under the corporate name of the Western & Atlantic Railroad, under lease to the Nashville, Chattanooga & St. Louis Railway from the State of Georgia, under contract of lease dated May 11th, 1917, under the Act of the General Assembly of Georgia approved November 30th, 1915, and the amendments thereto?"

"There is no question about your answer to that. The evidence in the case would demand, in the opinion of the Court that you answer that in the affirmative, that the Nashville, Chattanooga & St. Louis Railway is the lessee."

Said charge is erroneous in that

(a) The court thereby directed the jury to find that the Nashville, Chattanooga & St. Louis Railway is the lessee of the Western & Atlantic Railroad and its right of way, which is an expression of opinion by the court that the State of Georgia is the owner of the right of way to which it alleged in its petition that it had title, and which was one of the allegations which plaintiffs were required to prove. This was an invasion of the province of the jury, and a finding on the facts by the court which should have been found by the jury.

(b) The court directed the jury to find that the Nashville, Chattanooga & St. Louis Railway is the lessee from the State of Georgia [fol. 725] of the right of way of the Western & Atlantic R. R. but did not in any way instruct the jury, or give it any rules by which it can determine, what the "right-of-way" may be, or what limitations there may be to the "right-of-way," or whether the "right-of-way" is limited to the use of the land for railroad purposes only, title to the land and all other use and easement remaining in the original land owner, or whether ownership of "right-of-way" in land by the State of Georgia for the Western & Atlantic Railroad is or is not necessarily exclusive of ownership of easements in that land for a line of telegraph, and particularly the line of telegraph of the Western Union Telegraph Company.

98. The Court erred in charging the jury trying the case that he submitted a special issue in this case as follows:

"Question No. 3. Is the defendant, the Western Union Telegraph Company, maintaining and operating, over and upon and along the right of way of the Western & Atlantic Railroad, between Atlanta, Georgia, and Chattanooga, Tennessee, telegraph lines, poles, wires and other appurtenances employed in the conduct of its business?"

"You will answer that 'yes' or 'no.' Look to the evidence and see what is demanded and on which side the preponderance of evidence is."

The said charge is erroneous in that the court did not in any way instruct the jury, or give it any rules by which it can determine, what the "right-of-way" may be, or what limitations there may be to the "right-of-way," or whether the "right-of-way" is limited to the use of the land for railroad purposes only, title to the land and all other use and easement remaining in the original land owner, or whether ownership of "right-of-way" in land by the State of Georgia for the Western & Atlantic Railroad is or is not necessarily exclusive of ownership of easements in that land for a line of telegraph, and particularly the line of telegraph of the Western Union Telegraph Company.

[fol. 726] 99. The court erred in charging the jury trying the case that he submitted a special issue in this case, a written issue submitted by him to the jury, to-wit:

"Question No. 4. Is such maintenance and operation and occupation by the Western Union Telegraph Company of said right of way, substantially as described in paragraph VI of the original answer of the Western Union Telegraph Company in this cause, beginning with the words: 'the said lines of telegraph and said easements and interests in lands are situate,' and extending through the words: 'thence northwardly upon or along the western or left hand side going north of said right of way to a point about 1,819 feet north of mile post C-7, except that said use and occupation of said right of way begins at a point on the west side of the main track of the Railroad looking northwardly at or about 3,385 feet north of mile Post

C 136, the wires thence crossing to the east side of said track and continuing on said right of way, on said east side, to a point at or about 4,251 feet north of mile post C-136, the said telegraph line then leaving said right of way and not appearing thereon again until it crosses said right of way from the east side to the west side of said main track at a point at or about 1,037 feet north of mile post C-135, thence extending northwardly upon the said right of way west of said main track to a point at or about 1,947 feet north of mile post C-133, thence as set forth in said paragraph of the answer, down to a point about 1,819 feet north of mile post C-7?"

and in charging thereon as follows:

"That is, as I understand it to be the description of the right of way by the defendant itself as to where it occupies this right of way."

The error in so charging and directing the jury being:

(a) The same is an expression of an opinion on the evidence by the court and invades the province of the jury.

[fol. 727] (b) The defendant in its answer did not make the admission which the court stated it had made. The following language in question No. 4 does not appear in the answer of the defendant, and is not an admission of the defendant in its answer, to-wit: "except that said use and occupation of said right of way begins at a point on the west side of the main track of the Railroad looking northwardly at or about 3,385 feet north of mile Post C 136, the wires thence crossing to the east side of said track and continuing on said right of way, on said east side, to a point at or about 4,251 feet north of mile post C-136, the said telegraph line then leaving said right of way and not appearing thereon again until it crosses said right of way from the east side to the west side of said main track at a point at or about 1,037 feet north of mile post C-135, thence extending northwardly upon the said right of way west of said main track to a point at or about 1,947 feet north of mile post C-133, thence as set forth in said paragraph of the answer, down to a point about 1,819 feet north of mile post C-7."

100. The court erred in submitting to the jury as a special issue in this case the following:

"Question No. 5. Is said use and occupation without authority from the State of Georgia, contrary to the will and consent of the Nashville, Chattanooga & St. Louis Railway, as lessee of the Western & Atlantic Railroad, constituting an unlawful encroachment on said right of way and an adverse use thereof?"

The error being:

(a) The court did not state to the jury the principles or rules of law or equity applicable to the determination of the question submitted and to the issues raised by the pleadings applicable thereto.

(b) The court did not state to the jury the principles or rules of law or equity to guide the jury in determining the force and effect of [fol. 728] the contract of the Chief Engineer of the Western & Atlantic Railroad with Garst & Bean and the ratification of that contract by the act of the General Assembly of Georgia incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company, the material portions of which contract and ratifying act are set forth in ground 92 of this motion; and did not construe, and tell the jury the legal effect of, the written contract aforesaid with Garst & Bean and of the said act of the General Assembly of Georgia of 1852.

(c) The court did not in any way instruct the jury, or give it any rules by which it can determine, what the "right-of-way" may be, or what limitations there may be to the "right-of-way," or whether the "right-of-way" is limited to the use of the land for railroad purposes only, title to the land and all other use and easement remaining in the original land owner, or whether ownership of "right-of-way" in land by the State of Georgia for the Western & Atlantic Railroad is or is not necessarily exclusive of ownership of easements in that land for a line of telegraph, and particularly the line of telegraph of the Western Union Telegraph Company.

101. The court erred in submitting to the jury as a special issue in this case the following:

"Question No. 6. Is this suit instituted and prosecuted in the name of the State of Georgia and in its behalf under the Act of the General Assembly of the State of Georgia of Nov. 30th, 1915, and amendments thereof and the provisions of said contract of lease of May 11, 1917, by virtue of authority and direction of the Western & Atlantic Railroad Commission, and joined in by the Nashville, Chattanooga & St. Louis Railway, as such lessee?"

and in thereafter instructing the jury as follows:

"It is not denied that this case is prosecuted under that situation. The Court directs that you answer that in the affirmative."

[fol. 729] The court erred in directing the jury to answer that question in the affirmative and in stating that the defendant did not deny that the prosecution of this case is as stated in question 6. The defendant in Par. VIII of this answer admitted that the General Assembly of Georgia had passed the act of November 30th, 1915, providing for the leasing of the Western & Atlantic Railroad and for the appointment of a commission therefor and defining its powers and duties &c., and referring to said Act said:

"Said act created a commission 'authorized and empowered to lease and contract for the leasing of the railroad properties known as the Western & Atlantic Railroad, including the terminals thereof, and its property other than its railroad property not connected with either of its terminals'; directed said commission to make a report to

include 'a full and complete inventory of all personal property, rolling stock, equipment, supplies, tools, etc., to be included in the lease as received from the present lessee'; directed the commission to consider and determine among other things:

"7. What, if any, property is owned by the Western & Atlantic Railroad, not useful for railroad purposes, that could be properly and advantageously disposed of separately from the lease of the road.

"8. What, if any, steps should be taken to assert the right and title of the State to any part of the right of way or properties of the road that may be adversely used and occupied.'

"And required the Commission to cause to be prepared, if not otherwise obtainable, complete and accurate surveys, copies, profiles and easements showing:

"2. The extent and character of every use or occupation of the right of way, tracks and other properties of the road by any person or corporation other than the lessee, and the authority therefor.

[fol. 730] "3. The properties not used or apparently not useful for railroad purposes, with an estimate of the market value of such properties, and the use to which they might be applied.'

"Said commission was by said act further instructed and directed to prepare bills for presentation to the General Assembly to carry into effect any recommendation which it might make 'with respect to what steps should be taken to assert the right and title of the State to any part of the right of way of any part of the road that may be adversely used or occupied; and with respect to any other recommendations which, in its opinion, and which may require legislation by the General Assembly of Georgia to fully, completely and adequately protect all the interests of the State of Georgia in regard to said road and all of its parts and properties, whether reckoned as surface overhead or underground rights.'

"Defendant admits that the General Assembly of Georgia amended the last mentioned act by the adoption of an Act entitled 'An Act to amend an Act approved November *approved November* 30th, 1915, providing for the leasing or other disposition of the Western & Atlantic Railroad and its properties, and for the creation of a commission to effectuate such purpose, and for other purposes, by adding thereto other provisions further defining the powers and duties of the said commission; and for other purposes,' approved August 4, 1916.

"The amendment last mentioned contains language purporting to give the commission created by the said act of November 30th, 1915 full power and authority in its discretion to deal with and dispose of any and all encroachments upon, and use and occupations of, any part of the right of way and properties of the Western & Atlantic Railroad by any person other than the lessee under said act, its tenants and licensees whether such encroachments, use or occupancy be permissive or adverse, and whether with or without



[fol. 731] claim of right therefor; to determine whether such encroachments, uses and occupations or any of them shall be removed and discontinued, or whether they or any of them shall be permitted to remain, and if so to what extent and upon what terms and condition; with further authority to adjust, settle and finally dispose of any and all controversies that may exist or that may arise with respect to any adverse use or occupancy of any part of said right of way and properties of the Western & Atlantic Railroad in such manner and upon such terms and conditions as said commission may deem the best interest of the State require; and provides that all contracts and agreements made or entered into by said commission in settlement or disposition of matters touching such adverse uses and occupations shall be binding upon the State of Georgia; and further authorizing and empowering said commission to take such action as it might deem proper and expedient to cause the removal and discontinuance of any encroachment, use or occupancy of said right of way and properties which in its opinion should be removed or discontinued, and to that end the commission was authorized and empowered to institute and prosecute in the name and behalf of the State of Georgia such suits and other legal proceedings as it might deem appropriate in protection of the State's interest or the assertion of the State's title.

"Defendant admits that the present lease contract contains in it a reservation of a claimed right to remove or to cause to be discontinued any and all encroachments and other adverse uses and occupancies in and upon the right of way of the Western & Atlantic Railroad, whether maintained under any claim of lawful right or not, and that to that end the Nashville, Chattanooga & St. Louis Railway consented to the withholding of delivery of possession or right to possession of such portions of said properties, rights of way as may be so adversely used and occupied until encroachments and other adverse uses and occupancies had been discontinued; with the [fol. 732] further provision therein that the State of Georgia may at its option in such manner as it may deem best proceed to remove such encroachments, uses and occupancies in its own name and as the owner of the properties, and that to such proceedings the Nashville, Chattanooga & St. Louis Railway would become a party. For the exact and complete terms of said lease defendant refers to the lease itself and requires proof thereof.

"Defendant admits that said Western and Atlantic Railroad Commission has recently on a date unknown as to defendant passed a resolution with preamble and recitals therein, a copy of which is hereto attached as Exhibit 14. Defendant for lack of sufficient information is unable to admit or deny any act or resolution by said commission other than as herein admitted, nor the allegation that this suit is brought in accordance with authority and direction from said Commission. Defendant denies that said Commission has such power and authority, and denies that the Governor of Georgia and the Secretary of State of Georgia, who executed and delivered said



lease, had any power and authority to insert in said lease the aforesaid provisions, or to make the claims or asserts the rights in said provisions made, or to contract with respect thereto, and particularly in so far as such provision, claims, and claimed rights, apply to this defendant, and its said lines of telegraph and easements.

"Defendant denies that the act of November 30th, 1915, or any amendment thereof authorizes and empowers said Commissioners therein appointed

"To adopt said resolution, or to give the direction or authority therein set forth; or

"To take any act, or to institute this suit, or to institute any proceeding;

"To question or attack defendant's right to maintain, construct, reconstruct and operate in perpetuity its said lines of telegraph above [fol. 733] described, or to attack defendant's right and title thereto and to the perpetual easements and rights in land necessary therefor; or

"To attack or to seek to annul or have adjudged ineffective in any way or to any extent the grants and permits given by the State of Georgia to defendant and its predecessors in title by the statutes and resolutions of the State of Georgia herein above alleged; or

"To attack or impair any right or title in or to, or possession of, said easements and rights in, on, along, through or over the right of way of the Western & Atlantic Railroad, acquired as aforesaid by defendant or its predecessors in title; or

"To remove or to interfere with defendant's said lines of telegraph and easements; or

"To prevent or defeat the performance by defendant of its obligations under, or to deprive defendant of the rights, properties and franchises acquired by it under the said act of Congress and its amendments.

"Defendant alleges, if the Georgia Act of November 30th, 1915, or any amendment thereto has the force and effect and delegates the authority herein above denied by this defendant, but which defendant understands to be claimed for it by complainants in this suit and by said Commissioners appointed under said act, then said statute is opposed to the Constitutions of the United States and of Georgia; and in any event the said act and resolution of the said commissioners, and this suit, and any judgment or decree of any court giving to said statute the force and effect herein by defendant denied to it, but claimed in this suit by said complainants, and any judgment or decree of any court upholding, giving effect to, or enforcing said resolution of said Commissioners, and any judgment or decree of any court, granting the prayers of the petition in this cause, will be violative of the Constitutions of Georgia and of the United States in that thereby

[fol. 734] "(a) There will be an impairment of the obligations of contracts by a statute or law passed or made subsequently which violates

"Georgia Constitution Art. 1, Sec. 3, Par. 2.

"United States Constitution Art. 1, Sec. 10, Par. 1.

“(b) The State of Georgia will have made and enforced a law revoking grants of privileges or immunities granted to defendant and its predecessors above alleged in such manner as to work injustice to defendant which violates

"Georgia Constitution Art. 1, Sec. 3, Par. 3.

“(c) The rights, privileges and immunities which as above alleged have vested in, or accrued to, defendant under and by virtue of the acts of the General Assembly of Georgia will not be held in-violate by all courts before whom they may be brought in question, which violates

"Georgia Constitution Art. 12, Sec. 1, Par. 5.

“(d) Thereby property of defendant will have been taken without due process of law which violates

"Georgia Constitution Art. 1, Sec. 1 Par. 3.

Art. 1 Sec. 3 Par. 1.

“United States Constitution 14th Amendt.”

102. The court erred in submitting to the jury as a special issue in this case the following:

"Question No. 7. If you find that the Western Union Telegraph Company is occupying the right of way of the Western & Atlantic Railroad, then answer whether or not it is occupying such right of way without the authority of the State of Georgia and without consent of its lessee, the Nashville, Chattanooga & St. Louis Railway, as such lessee."

The error being:

(a) The court did not state to the jury the principles or rules of law or equity applicable to the determination of the question submitted and to the issues raised by the pleadings applicable thereto.

(b) The court did not state to the jury the principles or rules of law or equity to guide the jury in determining the force and effect of the contract of the Chief Engineer of the Western & Atlantic Railroad with Garst & Bean and the ratification of that contract by the act of the General Assembly of Georgia incorporating the Augusta, Atlanta & Nashville Magnetic Telegraph Company, the material portions of which contract and ratifying act are set forth in ground 92 of this motion; and did not construe, and tell the jury the legal effect of, the written contract aforesaid with Garst & Bean and of the said act of the General Assembly of Georgia of 1852. Nor did the court instruct the jury what would be the effect in this case and upon the claims of the plaintiffs if the jury should find under the evidence that the line of telegraph of the Western Union Telegraph Co. along the Western & Atlantic Railway was substantially the line of telegraph owned and operated by the Augusta, Atlanta & Nashville Magnetic Telegraph Company, and that the Augusta, Atlanta & Nashville Magnetic Telegraph Company under the

above mentioned contract and act of the General Assembly of Georgia possessed a perpetual easement therefor; nor did the court state to the jury the principles of law applicable to such situation which would properly guide them in answering the question, or whether under those circumstances the plaintiffs would be entitled to a verdict only the plaintiffs proved, in some manner provided by law, that *notwithstanding the grant of such perpetual easement to the Augusta, Atlanta & Nashville Magnetic Railroad Company* the State of Georgia had subsequently acquired title to that perpetual easement granted by it; nor did the court state to the jury any principles of law to guide it in determining whether the State had or had not under the evidence acquired title to such perpetual easements or telegraph lines after it had granted the same to the Augusta, [fol. 736] Atlanta & Nashville Magnetic Telegraph Company.

(c) The court did not in any way instruct the jury, or give it any rules by which it can determine, what the "right-of-way" may be, or what limitations there may be to the "right-of-way," or whether the "right-of-way" may be limited to the use of the land for railroad purposes only, title to the land and all other use and easement remaining in the original land owner, or whether ownership of "right-of-way" in land by the State of Georgia for the Western & Atlantic Railroad is or is not necessarily exclusive of ownership of easements in that land for a line of telegraph, and particularly the line of telegraph of the Western Union Telegraph Company.

[fol. 737]

#### EXHIBIT A TO AMENDMENT

"An Act to Authorize the Construction of the Magnetic Telegraph and Providing for the Protection of the Same, Approved Dec. 29th, 1847"

"Whereas, many of the citizens of the State of Georgia are interested in the construction of lines of the Magnetic Telegraph, and desire the protection of their property, and the privilege of using the public roads and highways for their posts and wires:

"Sec. I. Be it enacted, That any company or individual may erect posts and wires, and other fixtures for Telegraphic purposes, on or by the side of any public road or highway in this State: Provided, that such posts, wires or fixtures shall in no case be so set or placed as to obstruct, hinder, or in any way interfere with the common uses or business of said roads or highways.

"Sec. II. If any persons shall wilfully destroy, damage, or in any way injure said Telegraph, posts, wires, or fixtures, he or they shall be deemed guilty of misdemeanor, and may be indicted in the Superior Court of the County where such damage may be done; and upon conviction, shall be fined or imprisoned in the common jail of the County, or both, at the discretion of the presiding Judge."

[fols. 738-740] EXHIBIT "B" TO AMENDMENT—Omitted; printed  
side page 218 ante

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[fols. 741-743] EXHIBIT "C" TO AMENDMENT—Omitted; printed  
side page 221 ante

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[fols. 744 & 745] EXHIBIT "D" TO AMENDMENT—Omitted; printed  
side page 223 ante

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[fols. 746 & 747] EXHIBIT "E" TO AMENDMENT—Omitted; printed  
side page 226 ante

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[fol. 748] EXHIBIT "F" TO AMENDMENT

Daniel Kerr, Clerk

Office Clerk of Superior and City Courts, Richmond County, Georgia,  
Augusta, Ga.

STATE OF GEORGIA,  
Richmond County:

Clerk's Office, Superior Court

I certify that the indenture from Augusta, Atlanta & Nashville Magnetic Telegraph Co., to William Pylus & Samuel M. Scott, dated January 29th, 1855, was recorded in the office of the Clerk of the Superior Court, said County, February 22nd, 1855, in Book of Deeds & Mortgages 2-K, Pages 119-120, as appears of record in said office.

I further certify that the indenture from Augusta, Atlanta & Nashville Magnetic Telegraph Co., to J. Washborn, dated January 29th, 1855, was recorded in the office of the Clerk of the Superior Court, said County, February 22nd, 1855, in book of Deeds and Mortgages 2-K, Pages 121-122, as appears of record in said office.

I further certify that the indenture from Augusta, Atlanta & Nashville Magnetic Telegraph Co., to Samuel Clark, dated March 18th, 1855, was recorded in the office of the Clerk of the Superior Court, said County, May 1st, 1855, in book of deeds and Mortgages, 2-K, Pages 263-264, as appears of record in said office.

I further certify that the indenture from Robert Wiggins Sheriff to A. D. Hammett, dated Jan. 7th, 1859, was recorded in the office of the Clerk of the Superior Court, said County, March 26th, 1867, in books of Deeds and Mortgages, 2-V, Pages 143, as appears of record in said office.

I further certify that the certificates attached to certified copies of the above stated indentures mailed to W. L. Clay, Savannah, Ga., from this office May 4th, 1922, were signed and sealed by the Clerk of said Court, May 4th 1922.

Witness my signature and the seal of said Court.

This 29th day of May, 1922.

Daniel Kerr, Clerk Superior Court, Rich. Co., Ga. (Seal of Superior Court, Richmond County, Georgia.)

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[fols. 749 & 750] EXHIBIT "G" TO AMENDMENT—Omitted; printed side page 228 ante

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[fol. 751] EXHIBIT "H" TO AMENDMENT

Memorandum of an Agreement made and entered into this 12th day of August 1858 in the City of Lynchburg, Va., between Alvin D. Hammett of Marietta, Georgia, party of the first part, and Wm. S. Morris, Robert W. Crenshaw and John S. Langhorne of the City of Lynchburg, Virginia, parties of the second part.

Witnesseth:

That for and in consideration of the undertakings of the parties of the second part hereafter to be covenanted that the party of the first part agrees to sell transfer and assign to the parties of the second part all the line of telegraph from the City of Chattanooga in Tennessee to the City of Augusta in Georgia known and being a part of the Augusta, Atlanta and Nashville Magnetic Telegraph line with the side line to the City of Athens with all the privileges rights and franchises, appertaining thereto with all the wire, batteries, instruments and furniture belonging thereto, and to warrant and defend the title to the same against the claim or claims of all persons whatsoever.

The parties of the second part agree to pay to the party of the first part as soon as he shall transfer and assign to them (which he undertakes and agrees to do within the period of thirty days from the date of this instrument) that portion of the said line between Chattanooga in Tennessee and Atlanta in Georgia with a perfect title to the same, with all the wire, batteries apparatus and fixtures and instruments and all the rights and franchises appertaining thereto. the sum of Fifteen Hundred Dollars (\$1,500.00).

And the parties of the second part further agree to pay to the party of the first part whenever he shall deliver to them at Dalton in Georgia, one hundred miles of the wire which is now rolled up and distributed in the depots of the Georgia Railroad together with all the instruments, batteries apparatus and furniture on said line be-

tween Atlanta and Augusta the sum of Fifteen hundred dollars [fol. 752] (\$1,500.00).

And the parties of the second part further agree that whenever the party of the first part shall make to them a perfect and satisfactory title to all the Telegraph Line between Atlanta and Augusta (both in Georgia) known as a part of the Augusta, Atlanta and Nashville Magnetic Telegraph Line with a transfer of all the rights privileges and franchises appertaining thereto, with the branch line to Athens in Georgia with its appurtenances etc.—to deliver to the party of first part their three promissory notes for one thousand dollars (\$1,000) each, payable, one at four months, the second at eight months, and the third at twelve months from the date of said transfer of said line between Atlanta and Augusta with the Athens branch.

In witness whereof we have hereunto set our hands this day and date above named.

(Signed) A. D. Hammett, Wm. S. Morris, R. W. Crenshaw,  
F. S. Langhorne. Attest: F. B. Deans, Jr.

[fol. 753]

EXHIBIT "I" TO AMENDMENT

STATE OF GEORGIA,

Cobb County:

This indenture made this the first day of September in the year of Our Lord Eighteen Hundred and fifty eight, between A. D. Hammett of the county of Cherokee in said State of Georgia, of the one part, and William S. Morris, John S. Langhorn and Robert W. Crenshaw, of Lynchburg, Campbell County and State of Virginia, of the other part, witnesseth, that the said A. D. Hammett, for and in consideration of the sum of twenty five hundred dollars to him in hand paid, at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed, and by these presents doth grant, bargain, sell and convey, unto the said William S. Morris, John S. Langhorn, and Robert W. Crenshaw, their heirs and assigns, the Telegraph line from the City of Atlanta in the County of Fulton in said State of Georgia, to the line dividing the said State of Georgia, from the State of Tennessee, which said Telegraph line is situated and located immediatly along the line of the Western and Atlantic Railroad, a distance of one Hundred and twenty miles more or less, running through the following Counties, and parts of counties in said State of Georgia, towit, Fulton, Cobb, Cass, Gordon, Whitfield, and Catoosa, which said Telegraph line is known as the Augusta, Atlanta & Nashville Telegraph line. Together with all the Wire, posts, Insulators, Hooks, Franchises, Instruments, Acids, Zinks, and office furniture of every description whatsoever belonging or in any wise appertaining to said Telegraph line and the various offices

belonging thereto, at and between the said City of Atlanta, and the said line between the said States of Georgia and Tennessee. To have and to hold the said Telegraph line together with all and singular the Franchises, and all fixtures and furniture of every description whatever belonging to, or appurtenant to said Telegraph line between the points aforesaid, unto them the said William S. Morris, John S. Langhorn and Robert W. Crenshaw, their heirs, Executors, administrators and assigns, together with all the rights members and appurtenances thereof to the same in any manner belonging [fol. 754] to them, and their own proper use benefit and behoof forever in fee simple. And the said A. D. Hammett for himself his heirs, Executors and Administrators the said bargained property, and premises unto them the said William S. Morris, John S. Langhorn, and Robert W. Crenshaw, their Heirs and assigns, will warrant and forever defend the right and title thereof against the claim of all other persons whatsoever.

In witness whereof the said A. D. Hammett hath hereunto set his hand and seal the day and year first above written.

A. D. Hammett. (Seal.)

Signed Sealed and delivered in the presence of W. C. Ross, A. N. Simpson, N. P.

(Endorsements:) State of Georgia, Catoosa County: Clerk's office Superior Court. Recorded in this office in Book B, Page 333, March 30th, 1859. A. H. Foster, Dpt. C. S. C. Georgia, Cass County: Clerk's office Superior Court. Recorded in Book of deeds O, pages 194 & '5, this April 25th, 1859. James Wofford, Clerk. State of Georgia, Gordon County: Clerk's office Superior Court. Recorded in Record Deed Book D at page- 420 & '1, April 27th, 1859. I. B. Richards, D. Clk. No. 489. Georgia, Fulton County: Clerk's Office Superior Court. Recorded in Book D on page 137 on the 17th day of March, 1859. B. H. Bomar, Clerk. State of Georgia, Whitfield County: Recorded in the Clerk's Office of the Superior Court of said County in Book D, Page 74, and certified for March 30th, 1859. Geo. W. Anderson, Clk. A Deed from A. D. Hammett to Wm. S. Morris, John S. Langhorn & Robert W. Crenshaw for the Telegraph line from Atlanta to the Tennessee Line on Western & Atlantic R. R. \$2,500. Regist. in Clerk's office of Cobb Supr. Court in Book S Page 457 Feby. 18th, 1859. J. M. Bannrell, Clk. Box No. N 86. File No. —. Identified May 25/22. D. O. S.

[fol. 755]

# EXHIBIT "J" TO AMENDMENT

STATE OF TENNESSEE,  
Hamilton County:

This indenture, made this the thirteenth day of November in the year of our Lord eighteen hundred and fifty eight between George



L. Willy of the City of Nashville in said state of Tennessee of the one part, and William S. Morris, John S. Langhorne and Robert W. Crenshaw of Lynchburg, Campbell County and State of Virginia of the other part,  
 Witnesseth:

That the said George L. Willy for and in consideration of the sum of five hundred dollars to him in hand paid at and before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, hath granted, bargained, sold and conveyed and by these presents doth grant, bargain, sell and convey unto the said William S. Morris, John S. Langhorne and Robert W. Crenshaw their heirs and assigns the telegraph line from the city of Chattanooga running through said county of Hamilton and located immediately along the line of the Western & Atlantic Railroad to the State Line dividing the State of Tennessee from the State of Georgia, which said Telegraph line is known as the Augusta, Atlanta and Nashville Telegraph line—together with all and singular the wires, posts, insulators, hooks, franchises, instruments, and zines and office furniture of every description whatever belonging or in anywise appertaining to said telegraph line and the various office belonging thereto, at and between the points aforesaid.

To have and to hold the said telegraph line together with all and singular the franchises and all fixtures and furniture of every description whatever belonging to or appertaining to said telegraph line between the points aforesaid unto the said Morris Langhorne and Crenshaw their heirs executors administrators and assigns, together with all the right, members and appurtenances thereof to the same in any measure belonging to them and their own proper use benefit and behoof forever in fee simple. And the said George L. [fol. 756] Willy for himself his heirs executors and administrators the said bargained property and premises unto the said Morris Langhorne and Crenshaw their heirs and assigns will warrant and forever defend the right and title thereof against the claim of all other persons whatever.

In witness whereof the said George L. Willy hath hereunto set his hand and affixed his seal the day and year first above written.

George L. Willy. (Seal.)

Signed, sealed and delivered in the presence of Us, Jno. C. Burch, R. M. Hooke.

STATE OF TENNESSEE,  
 Hamilton County:

Personally appeared before me Geo. W. Arnett Clerk of the County Court for said County George L. Willy the maker of the foregoing deed with whom I am personally acquainted and acknowledged the execution of said deed according to date and tenor of the same.

Witness my hand at office in Chattanooga the 20th day of November, 1858.

Geo. W. Arnett, Clerk, by J. P. McMillin, D. C.

STATE OF TENNESSEE,  
Hamilton County:

Register's Office the 25th day of November, 1858 at 8 o'clock A. M., then was the foregoing deed and certificate recd. for registration and is now of record in my office in Book M, page 404.

Witness my hand at office in Harrison the day and date last above written.

J. B. Peters, Register.

[fol. 757] STATE OF TENNESSEE,  
County of Hamilton:

I, S. A. Watson, certify that I am the Register of Hamilton County, Tennessee, and in charge of the Register's office of Hamilton County, Tennessee, which is a public office of the State of Tennessee, not appertaining to a court, and in which office are recorded deeds, mortgages and conveyances of all kinds under which the property in said State and county are conveyed or *or* mortgaged; that I am the keeper of the records or books in said office; that the foregoing two pages contain a true, correct and complete copy of an indenture recorded in said office on November 25th, 1858 in Book M Volume 1, page 404. I further certify that this office has no official seal.

In witness whereof I have hereunto affixed my official signature of said office this May 11th A. D. 1922.

S. A. Watson, Register.

STATE OF TENNESSEE,  
County of Hamilton:

I, Oscar Yarnell hereby certify that I am presiding justice or judge of the Circuit Court of the County of Hamilton, State of Tennessee; that the Register's office of Hamilton County, Tennessee is in said county of Hamilton, Tennessee; that S. A. Watson is the Register of Hamilton County, Tennessee, which is a public office of said State and County not appertaining to a court, and the signature to the foregoing certificate is the genuine signature of said register of Hamilton County, Tennessee, and the foregoing certificate and attestation is in due form and by the proper officer.

In witness whereof I have hereunto affixed my official signature and have caused the seal of the said Circuit Court in and for Hamilton County, Tennessee to be hereto affixed attested by the Clerk of said Court. This May 11th, 1922.

Oscar Yarnell, Judge of the Circuit Court of Hamilton County, Tennessee. (Seal Circuit Court, Hamilton County, Tennessee.)

[fol. 758] STATE OF TENNESSEE,  
County of Hamilton:

I, Mance Sherrill, hereby certify that I am the Clerk of the Circuit Court of Hamilton County, Tennessee, which is a court of record; that the Honorable Oscar Yarnell is the presiding justice or judge of said court, duly commissioned and qualified, and that the foregoing signature is his genuine signature.

In witness whereof I have hereunto affixed my official signature and the seal of the Circuit Court of Hamilton County, Tennessee. This May 11th, A. D. 1922.

Mance Sherrill, Clerk of the Circuit Court of Hamilton County, Tennessee. (Seal Circuit Court, Hamilton County, Tennessee.)

[fol. 759] EXHIBIT "K" TO AMENDMENT

This deed made the 28th day of December, 1859 between William S. Morris, John S. Langhorne and Robert W. Crenshaw of the City of Lynchburg and State of Virginia, of one part, and the American Telegraph Company a body politic incorporated by the Legislature of the State of New Jersey of the other part,

Witnesseth:

That in consideration of the issue and delivery to them of certificates of One hundred and twenty shares of the Capital Stock of the said American Telegraph Company the parties of the first part do grant, bargain, sell, assign, transfer and release unto the party of the second part, the line of Electric Telegraph extending from the town of Chattanooga in the State of Tennessee to the town of Atlanta in the State of Georgia, together with all the wires, posts, insulators, batteries and instruments of every kind thereto belonging, and the office furniture in the offices on the said line and all the appurtenances to the said line belonging, or in any wise appertaining, and all the rights of way and privileges held with the said line or any part thereof: which said line is known as the Augusta, Atlanta and Nashville Magnetic Telegraph Line and is more particularly described in two certain deeds of conveyance executed to the said parties of the first part, one of which is made by a certain A. D. Hammett, bearing date the first day of September, 1858 and of Record in the Counties of Fulton, Whitfield, Catoosa, Cass and Gordon in the State of Georgia—and the other of which is made by George L. Willy, bearing date the 13th day of November, 1858 and of record in the offices of the clerk and Register of the County of Hamilton in the State of Tennessee, to which reference is hereby made: To have and to hold the aforesaid line of telegraph, with all and singular its franchises and property aforesaid including the

side-line mentioned in the deeds aforesaid to the City of Athens in the State of Georgia, to the said party of the second part its successors and assigns forever.

[fol. 760] And the said parties of the first part do further grant and convey unto the said parties of the second part, in consideration of the issue and delivery to them of the additional number of five shares of the Capital Stock of the said American Telegraph Company, whatever right title or interest they now have or may hereafter acquire to construct a Telegraph line from the said town of Atlanta to the City of Augusta in the State of Georgia, under the charter of the Augusta, Atlanta and Nashville Magnetic Telegraph Company by virtue of a contract between said parties of the first part and the said A. D. Hammett bearing date the 12th day of August in the year 1858.

And the said parties of the first part for themselves their heirs, &c. do covenant jointly and severally with the said party of the second part their successors and assigns that they have good right and title to make the said assignment of the said Telegraph line from Chattanooga to Atlanta with the appurtenances in manner aforesaid, and so that the said party of the second part may hold and enjoy the same without any lawful claim, hindrance or interruption of any Company or Companies, person or persons whomsoever.

In witness Whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

(Signed) W. S. Morris, J. S. Langhorne, R. W. Crenshaw.

STATE OF VIRGINIA,

City of Lynchburg:

I, William Waller a Justice of the Peace in and for said City do hereby certify that William S. Morris, Robert W. Crenshaw and John S. Langhorne, whose names are signed to the foregoing deed bearing date on the 28th day of December, 1859 personally appeared before me in said City and acknowledged the same to be their act and deed.

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[fols. 761-766] EXHIBIT L TO AMENDMENT—Omitted; printed side page 270 ante

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[fol. 767] EXHIBIT M TO AMENDMENT—Omitted; printed side page 276 ante

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[fol. 768] EXHIBIT "N" TO AMENDMENT

This Agreement made and executed this 12th day of June A. D. 1866 by and between the American Telegraph Company, a corpora-

tion chartered by the State of New Jersey, party of the first part, and the Western Union Telegraph Co., a corporation existing under the laws of the State of New York party of the second part.

Witnesseth: That whereas it is deemed necessary and expedient on the part of the respective Telegraph Companies herein named, that an equitable agreement be made for the united management of the property and business of the companies and a consolidation of interests involved, in order to facilitate and expedite the service of the public in the transmission and delivery of messages, and to secure on a more firm and reliable basis and advance the interests of the stockholders.

Now therefore, it is mutually agreed by and between the parties hereto as follows:

First. The party of the first part in consideration of the premises and other valuable considerations covenanted, paid, and to be paid, does hereby grant, lease, and convey to the party of the second part the right to take the possession, use, management and control of all lines of Telegraph, owned, leased, operated or controlled by the party of the first part, wherever situated, together with all the instruments, poles, insulators, wires and other materials grants, property, and right to property of every description, including moneys on hand or due, to which the party of the first is now or may be hereafter entitled, and also all franchises so far as they can be lawfully transferred, and to use operate and enjoy the same in such way and manner as the party of the second part may deem to be for the benefit of the interests involved.

And the party of the first part agrees to execute such other and further instruments of conveyance or agreements as may be necessary or reasonably be required by the party of the second part to convey a good title to all or any of the above described property, or to give full force and effect to the true intent and meaning of this [fol. 769] agreement.

Second. The party of the first part agrees that all business hereafter done by them and until their lines and property are turned over, as herein provided, shall be accounted for, and the net proceeds thereof enure to the party of the second part, and that no dividend in money stock or property shall be hereafter made to any of the stockholders of the said party of the first part, except such as may accrue after the consolidation provided for by this agreement.

And the party of the second part, in consideration of the premises hereby agrees:

First. To choose annually for five years from and after the execution and ratification of this agreement from those now stockholders or members of the Board of Directors of the party of the first part, and who shall continue to be stockholders in the Company composing the party of the second part, and be otherwise eligible thereto, four persons to be members of the Board of Directors of the party of the second part if the said Board consists of fifteen members, and

a like proportionate number to the whole if the number of said Board shall be increased.

Second. To increase its Capital Stock, which as now issued and contracted to be issued, is Twenty eight millions four hundred and fifty thousand dollars (\$28,450,000.00) by the further issue of shares of the par value of one hundred dollars each, and to exchange such stock for all or any portion of the present capital stock of the party of the first part, at the option of the holders thereof, if presented for exchange at the executive office of the party of the second part with the power assignment and transfer to said last named party at any time within six months from the and after the twentieth day of the present month upon the following terms, viz., Three shares of stock of the party of the second part for each one share of stock of the party of the first part, the par value of each being one hundred dollars, and the number of shares of stock of said party of the first part issued or to be issued, entitled to be exchanged under this agreement [fol. 770] shall not exceed forty thousand (40,000) equal to four millions of dollars of Capital Stock of said party requiring an issue of not exceeding one hundred and twenty thousand shares, equal to twelve millions of dollars of Capital Stock of said second party to be exchanged for and take up all of the stock of said first party under the terms of this agreement.

Provided However, that in case all of the stock of the party of the first part shall not have been exchanged within the time hereinbefore specified, then the holder or holders of such unexchanged stock, shall be entitled to receive semi-annually, on the first day of January and July of each year from the said party of the second part an interest or rental income on his said stock, at the rate of eight per cent per annum upon the amount represented by the par value of such unexchanged American Tel. Stock the period for which such rent or interest shall be computed to commence on the first day of July A. D. 1866.

Third. To assume and be responsible for all the debts, liabilities and legal obligations whatsoever of the said party of the first part, it being the purpose and intention of this agreement to substitute the party of the second part for the party of the first part in the control and management of all the property rights and interests of said party of the first part, and in, and as to any and all legal obligations now existing, or which may hereafter arise from any contract now existing to which the party of the first part is a party and this stipulation is to be deemed as made for the benefit of any and all parties to legal contracts with the party of the first part who may elect to accept performance by the party of the second part as a substituted party to such contracts, and the party of the second part hereby covenants and agrees to hold the party of the first part harmless from any and every legal claim and demand of every nature either on account of its business operations, or embraced in, or growing out of its several contracts absorbing the Magnetic, the South Wester, the Washington and New Orleans, and other Telegraph Companies.

It is further mutually agreed and understood by and between the [fol. 771] parties hereto, that the party of the second part may, prior to exchanging any of its stock for that of the party of the first part, declare and pay out of the earnings and profits accruing prior to the first day of July A. D. 1866, a dividend of not exceeding two per centum upon the par value of its stock then issued or liable to be issued in exchange for stock of the United States Telegraph Company then outstanding. But the said party of the second part shall not make any other or further dividends of money or stock, or parcel out to its stockholders or others any portion of its assets in which the stockholders of the party of the first part shall not be entitled to participate.

And also to continue to maintain an organization of the American Telegraph Company so long as deemed essential in order to secure to the interests hereby consolidated all rights benefits and privileges which can only be enjoyed under such organization.

This agreement to take effect and be in operation when ratified and approved by the respective Boards of Directors of the Companies parties thereto.

In witness Whereof, the parties hereto have caused the seals of their respective companies to be attached, duly attested, and the signatures of their respective presidents to be subscribed.

American Telegraph Co., by Edwards S. Sanford, President.  
C. Livingston, Secty. A. T. Co. (Seal.) The Western  
Union Telegraph Co., by J. H. Wade, President. Attest:  
O. H. Palmer, Sec. W. U. Tel. Co. (Seal.)

[fol. 772]

#### EXHIBIT "O" TO AMENDMENT

Special Meeting of the Board of Trustees of the American Telegraph Co. Called by the Secretary in Pursuance of Resolution at Previous Meeting Held in City of New York 12 June, 1866

Present: President & Vice President Messrs. Morse, Alden Burgess, Lefferts, Morris, Van Horne, Carter Livingston & Hunt—11.

The Committee appointed at the last meeting of the Board to negotiate with the Western Union Telegraph Company Reported in writing signed by the five members (being all) of the Committee That they had effected an arrangement of consolidation on the terms substantially as authorized by the Board. The Committee found that the W. U. Co. had already issued & agreed to issue \$28,450,000 of stock—instead of \$28,000,000 as supposed at our last meeting—But that Company had cash assets which if converted would be sufficient to purchase this excess—upon examination of the W. U. Co.'s exhibits at Rochester where 3 members of the Co. attended—the Committee were satisfied to waive this point, and proposed to consolidate & take three (3) shares of W. U. Tel. Co.'s stock for one (1) of American.



After much opposition on the part of W. U. Co. they have assented to our proposition, and the Committee presented for approval a Contract to be authorized by the Board, without the necessity of a ratification by the Stockholders, as it is thought that it would be impracticable to get many of them to act in time—1st July next, when the W. U. Co. are to take possession of our lines under the Contract and Lease.

Those Stockholders who do not accept the exchange—will received 8% Perpetual Rent Per Annum—or cancel their stock which has now advanced from \$115—its market price when the negotiation commenced—to \$160 its present market price.

The Contract was discussed & modified so as to retain the Charter organization of American Tel. Co. Mr. Livingston moved Mr. Carter Seconded

Resolved that the officers of the Company be authorized to execute the Contract between the American Telegraph Company of the first part and the Western Union Telegraph Company of the second part dated the twelfth day of June 1866 and now presented and read to the Board.

The Ayes and Noes being called the following members voted Aye. Messrs. Lefferts, Burgess, Carter, Hunt, Sanford, Green, Alden Morse, Livingston, Van Horne, & Morris—11.

Nays none.

Vice President read telegram from Mr. Geo. L. Douglass a member of the Committee approving the arrangement which was ordered to be filed in lieu of his vote.

The Officers—President Sanford executed the Contract and Seal affixed & attested by C. Livingston Sec'y, Mr. Livingston moved Mr. Hunt Seconded

Resolved that the Board of Directors of the American Telegraph Company do ratify & approve the Contract executed by its officers in their presence.

The Ayes & Noes being called all the members present as above named viz. 11 voted Aye.

Noes none.

The Vice President being in the Chair Mr. Sanford moved Mr. Livingston seconded

Resolved that of the remaining stock necessary to make Four (4) millions—less Eight (8) shares to make fractions and not to exceed twenty one (21) shares be issued to Mr. E. N. Archibald without charge as a compensation for his services to this Company.

Adopted unanimously.

Prof. Morse moved Mr. Lefferts Seconded

Resolved that the thanks of this board be tendered to E. S. Sanford, Esqr. our President for his uniform courtesy, and efficiency

in his office, and expressing our cordial wishes for his health during his proposed absence and safe return to us and his friends.

Adopted unan'y.

The President returned his thanks for the kindness and good feeling, which the Board had at all times shown towards him and hoped that its future would be as happy and harmonious as it had heretofore been.

On motion adjourned.

C. Livingston, Secy. A. T. Co.

[fol. 774]

# EXHIBIT "P" TO AMENDMENT

Adjourned Meeting of the Board of Directors at the Office of the Secretary June 14, 1866

Present: J. H. Wade, Pr., in the Chair; Hiram Sibley, Ezra Cornell, Saml. Wilder, H. R. Selden, Isaac Butts, D. A. Watson, Fred DeLano, P. McD. Collins, Anson Stager, B. R. McAlpine, R. S. Burrows.

The minutes of previous meetings were read and approved.

Also proceedings of Executive Committee from May 15 to June 2, inclusive were read and approved.

Resolved—that a call of Five Dollars a share be, and the same is hereby made, upon the outstanding stock of the Extension Line (Collins Overland Line, via Behring's Strait) payable on or before the Sixteenth day of July 1866, at the office of the Secretary, in the City of Rochester, N. Y., in funds current in the City of New York.

That for the purpose of such call the transfer books be closed on the first day of July, 1866, and remain closed until the 17th day of July 1866.

Resolved—That after the books are so closed no transfer of stock subject to such call will be made until the required payment shall be made.

The committee appointed to negotiate with the American Telegraph Company reported to the Board that they had concluded a contract with said company for the consolidation of the respective lines and presented a contract executed on the part of the American Company embracing the terms and conditions of such consolidation which is in the words and figures following: (The contract here set out is the contract of which Exhibit "N" hereto attached is a copy and is therefore not again copied here.)

On motion:

Resolved—That the contract of consolidation with the American Telegraph Company bearing date June 12th, 1866 be and the same

is hereby approved, ratified and confirmed and that the president execute the same on the part of this company and that the corporate seal be affixed thereto and attested by the Secretary.

Adopted all ayes.

[fol. 775]

EXHIBIT "Q" TO AMENDMENT

STATE OF GEORGLA,

Fulton County:

Petition

To the Honorable Superior Court of said county:

The petition of Enoch R. Mills for the use of Joseph G. W. Mills sheweth, that the Augusta, Atlanta and Nashville Magnetic Telegraph Company of said State and County, has injured and damaged your petitioner in the sum of Sixteen Hundred & Fifty two Dollars and Thirty-six cents besides interest. For the whereas on or about the eleventh day of January in the year Eighteen Hundred and Fifty-four the defendant in accordance with the powers voted in it by its charter and the by laws passed in pursuance thereof appointed your petitioner general agent for the erecting building and the contracting for erection and building and the advancement of money for and the payment of the construction by the laborers employed on the same of the Telegraph line from the City of Augusta in the State of Georgia by way of Atlanta and Chattanooga to Nashville in the State of Tennessee and secure stock for the same at and for a larger sum than Sixteen Hundred and Fifty-two Dollars and Thirty-six cents which is the balance left unpaid besides interest by the said defendant for the work and labor after that time done and performed care and diligence of your petitioner bestowed in & about the business of the said defendant and sums of money advanced and goods and merchandise bought used and bestowed in and about the work of the defendant as its aforesaid agent all of which was adopted by the said defendant embracing the period of time intervening the twenty ninth day of December in the year 1854 to the eighth day of April in the year eighteen hundred and fifty five, all of which will more fully appear by a bill of items hereto attached which your petitioners prays may be taken and considered as a portion of this suit and at the defendant's special instance and request and for divers journeys and attendances by your petitioner during that time made performed and given in and about the said work and labour for the said defendant at its like special instance and request and being so indebted the defendant in consideration thereof afterwards to-wit on the day and the year last [fol. 776] aforesaid undertook and faithfully promised to pay your petitioner the said last sum of money when the defendant should be thereunto afterwards requested.

And whereas also afterwards to-wit on the eighth day of May in the year eighteen hundred & fifty five in consideration that your petitioner at the like special instance and request of the defendant

had before that time been made that your petitioner would act and give his care and attention as president of the said Company as well as general agent for the completion of its works a larger sum than sixteen hundred & fifty two dollars and thirty-six cents which is the balance left unpaid besides interest on the same for the work labor care and diligence journeys and attendance of your petitioner by your petitioner before that time done and performed and bestowed in and about the business of the defendant as agent and president of the said company on his salary as office and the pay due him as general agent of the company on and of right payable from the defendant to your petitioner in respect thereof as will more fully appear by reference to a bill of particulars hereto attached which your petitioner prays may be taken and received as a portion of this count and your petitioner avers that he performed all the duties required of him as president and general agent and has not been "enumerated" and the said defendant being so indebted the defendant in consideration thereof afterwards to-wit on the day and year last aforesaid undertook and faithfully promised to pay your petitioner the said last sum of money when the defendant should be thereunto afterwards requested.

And whereas also afterwards on the eighth day of May in the year eighteen hundred and fifty five in consideration that your petitioner at the like instance and request of the defendant had before that time been made would procure articles and pay for the same for the use of the Augusta, Atlanta & Nashville Telegraph Company in the construction of its works and the establishment of offices for the transaction of the needful business of the Said Company and would give your petitioners personal care and attention [fol. 777] exertions and labor in forwarding the interests of the said Company and the procurement of materials and laborers on the same in consideration thereof the said defendant undertook and faithfully promised to pay your petitioner so much money as he thought reasonably deserved when the said defendant should be thereunto afterwards requested. And your petitioner avers that he therefore reasonably deserves to have of the defendant the further sum of sixteen hundred and fifty two dollars and thirty six cents the balance left unpaid of the thirty five hundred and forty one dollars and thirty six cents besides interest on the same whereof the said defendant on the day and year last aforesaid had notice a bill of particulars of which is hereto attached which he prays may be taken and considered as a part of this Count.

And whereas afterwards towit on the day and year last aforesaid in consideration that your petitioner at the like special instance and request of the defendant had at and before that time been made and given would pay to your petitioner the full value of the goods, wares merchandise labor done and performed and money paid all of which will more fully appear by a bill of particulars hereto attached which your petitioner prays may be taken and considered as a part of this count as the last mentioned goods wares merchandise labor performed and money paid should be worth at the delivery thereof

when the said defendant should be thereunto afterwards required. And your petitioner avers that the said last mentioned goods wares merchandise labor and money paid on each with the several sums mentioned in the bill of particulars hereto attached, from which a balance is left as due after all legal and equitable deductions the sum of sixteen hundred & fifty two dollars and thirty one cents.

Whereof the said defendant afterwards to-wit on the day and year aforesaid had notice and faithfully promised to pay your petitioner the last mentioned sum of money when he should be thereunto afterwards requested.

[fol. 778] And whereas, the said defendant heretofore to-wit on the eighth day of May in the year eighteen hundred and fifty five was indebted to your petitioner for so much money by your petitioners before that time laid out paid and expended to and for the use of the defendant at its special instance and request and showing the several sums paid the persons to whom paid and the dates of the payments all of the vouches for which are in the possession of the said Company which your petitioner prays may be taken and considered as part of this Count which after all legal and equitable deductions leaves a balance due and unpaid to your petitioner besides interest the sum of sixteen hundred and fifty two dollars and thirty one cents. And being so indebted the said defendant in consideration thereof afterwards on the day and year last aforesaid undertook and faithfully promised to pay your petitioner the aforesaid sum of money and interest thereon when the said defendant should be thereunto afterwards requested. And whereas also the said defendant afterwards to-wit on the day and year last aforesaid accounted with your petitioner of and concerning divers other sums of money from the said defendant to your petitioner before that time due and owing and then in arrears and unpaid and upon such accounting the said defendant was then and there found to be in arrears and indebted to your petitioner in the further sum of sixteen hundred & fifty two dollars & thirty one cents besides interest and being so found in arrears and indebted the said defendant undertook and promised to pay your petitioner on the day and year last aforesaid the aforesaid last sum of money mentioned with the interest thereon when the defendant should be thereunto afterwards requested a bill of particulars is hereto attached which your petitioners prays may be taken as part of this count.

Yet the said defendant although so indebted and to pay the said [fol. 779] several sums of money before stated has not paid the sum nor any part thereof although often requested so to but craftily and subtly intending to defraud and deceive your petitioner and unrighteously keep him from the obtainment of his just rights in the premises the same to pay have wholly neglected and refused and still neglect and refuse to the damage of your petitioner four thousand dollars.

Wherefore your petitioner prays that process may issue requiring the said Augusta, Atlanta & Nashville Telegraph Company in person or by attorney to be and appear at the next Superior Court to be held in and for the county of Fulton on the first Monday in

April next then and there to answer your petitioner in an action of  
 assumpsit & C.

Arthur W. Manning, Plff. Atty.

Atlanta & Nashville Telegraph Company, Cr.

1854.					
Dec. 30.	By cash paid	McCann & Adams.....		22.00	
" "	" "	A. Hamilton .....		7.65	
" "	" "	R. F. Fleming.....		8.00	
1855.					
Jan. 1.	" "	Louisville Glass Works.....		51.40	
" "	" "	Leiper & Manifer .....		22.43	
" "	" "	Vanevry & Turbiville .....		15.55	
" "	" "	James Grizzard .....		7.98	
" "	" "	Charles Carville .....		5.04	
" "	" "	Michael Castor .....		100.00	
" "	" "	James Erwin .....		11.55	
" "	" "	C. A. Grant .....		1.69	
" "	" "	Q. C. De Grove .....		14.00	
" "	" "	R. H. Brigham .....		21.00	
" "	" "	I. W. Norton .....		58.20	
[fol. 780]					
Feb. 2.	By cash paid	Wm. Sazfier.....		22.35	
" "	" "	L. M. Temple .....		10.00	
" "	Int. on \$2,500 borrowed of	Wm. Pybus.....		83.33	
" "	Cash paid	W. G. Barton .....		35.00	
Apr. 27.	" "	Pirce & Wetherford .....		1,500.00	
" "	" "	T. S. Pierce .....		84.70	
" "	Int. paid on \$300 of	S. Scott.....		6.00	
" "	" "	\$300 " S. Clark .....		5.40	
" "	Cash paid	Morris & Mathews .....		10.00	
" "	" "	S. West .....		51.00	
" "	" "	A. J. Dobbs .....		300.00	
" "	" "	A. Gunter .....		50.00	
May 1.	" "	B. R. McKinni & Co.....		100.00	
" "	" "	I. S. Marling & Co. ....		100.00	
" "	" "	Wm. Sazfier .....		125.00	
" "	" "	W. F. Baug & Co.....		100.00	
" "	" "	Wm. Syth .....		100.00	
" "	" "	Robt. Buchanan .....		100.00	
" "	" "	D. S. Evans .....		100.00	
" 5.	" "	Stephen White .....		\$3,229.27	
" "	" "	Dr. Gregory .....		50.00	
" "	" "	F. A. Parham .....		100.00	
" "	" "	Tho. Crutchfield .....		100.00	
" "	" "	Young Crooker .....		66.00	
" "	" "	Express Freight on wire .....		109.00	
" "	" "	Costs to Esq. "Tunifs" .....		5.80	
" "	" "	Fare on N. & C. R. Road .....		15.60	
Amount carried forward .....				\$3,725.63	

	By amt. brt. forward .....	3,725.63
May 5.	By cash paid Henry Marson .....	150.00
	“ “ “ For 500 Brackets .....	15.00
[fol. 781]	“ “ “ I. W. Alley .....	100.00
	“ “ “ I. Witherford .....	30.00
	“ “ “ D. M. Hoyt .....	33.00
	“ “ “ E. R. Mills service as Prest. 7 Mos. ....	785.00
	“ “ “ Thiggins, Wells & Co. ....	100.00
	“ “ “ B. F. Tuitt .....	100.00
	“ “ “ Tools & Repair on line .....	75.00
		<hr/> 5,193.67
	“ “ “ W. & A. R. R. Freight on Sundries .....	109.00
	“ “ “ Two barrels Insulators .....	33.00
	“ “ “ Samuel Scott .....	140.00
		<hr/> 282.00
	E. R. Mills in Acct. with Augusta, Dr.	
1855.		
Jany. 29.	To Cash borrowed of Pybus .....	2,500.00
“ “	“ “ “ “ Sam'l Scott .....	375.36
Feby. 15.	“ “ “ “ I. D. James & Co. ....	306.00
March 17.	“ “ “ “ Saml. Clark .....	360.00
		<hr/> \$3,541.36
	E. R. Mills in Acct. with Augusta, Dr.	
May 7.	To Amt. brt. forward .....	3,541.36
	“ Balance .....	1,652.31
		<hr/> \$5,193.67

Balance, \$1,652.36.

“For value received I hereby transfer the within account to I. G. W. Mills, Dec. 7, 1855.

E. R. Mills.”

[fol. 782] GEORGIA,  
Fulton County:

[Title omitted]

#### ASSUMPSIT & SUMMONS

To the Sheriff of said County, Greetings:

The defendants are hereby required personally or by attorney to be and appear at the Superior Court to be held in and for said County



of the first Monday in April next then and there to answer the plaintiff's complaint in an action of Assumpsit & Co. as in default thereof said Court will proceed as to justice shall appertain.

Witness the Honorable O. A. Bull, judge of said Court this Dec. 26th, 1853.

B. F. Bomar, Clerk.

And now at this term of Court comes the defendant by its Attorney L. E. Bleckley and for plea and answer saith that this Court ought not to have or maintain jurisdiction of the plaintiff in said cause because this defendant says that William L. Mitchell was at the commencement of said suit and still is the president and chief office- of said Augusta Atlanta & Nashville Magnetic Telegraph Co. and that the said William L. Mitchell was not then nor is he now a resident of the County of Fulton but was then and still is a resident of the County of Clarke in said State, where the records and principal office of said company are kept. And this the said defendant is ready to verify.

Lee Bleckley, Deft.'- Attorney.

GEORGIA,

Fulton County:

I, William L. Mitchell, do solemnly swear that the facts stated in the above plea and answer are true.

Wm. L. Mitchell, Augusta, Atlanta & Nashville Tel. Co.

Sworn to and subscribed in this Court this 8th day of April, 1856. W. R. Venable, Clk.

Served the Augusta, Atlanta & Nashville Magnetic Telegraph Company by leaving a copy of the within with the agent at their office in the City of Atlanta. This Dec. 29th, 1853.

Jas. Smith, Sheriff.

#### VERDICT

We the jury, find for the plaintiff the sum of sixteen hundred and fifty two dollars and thirty one cents besides interest and costs this [fol. 783] April the 11th, 1858.

William J. Rolador, Foreman.

It is ordered by the Court that the within plea be stricken the defendant having abandoned the same and failing to respond to a notice to produce books and papers this April the 11th, 1858. Passed by the Court.

Jethro W. Manning, Plff.'- Atty.